(2) Supreme Court, U.S.
FILED

01 802 OCT 24 2002

OFFICE OF THE CLERK

No.

IN THE
Supreme Court of The United States

DIRECTOR OF REVENUE OF THE STATE OF MISSOURI,
Petitioner,

VS.

MARY E. LEWIS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

JEREMIAH W. (JAY) NIXON
Attorney General
JAMES R. LAYTON
State Solicitor
ERWIN O. SWITZER, III*
Special Chief Counsel
KRISTEN H. GARROWAY
Assistant Attorney General
Wainwright State Office Building
111 North 7th Street, Suite 204
St. Louis, Missouri 63101
(314) 340-6816

Counsel for Petitioner,
Director of Revenue

****Counsel of Record***

8698

QUESTIONS PRESENTED

1. Is a statute delegating decisionmaking authority to a state official facially invalid under the First Amendment merely because it does not preclude the possibility that the state will engage in viewpoint discrimination while using that authority?

2. Does the First Amendment prohibit a state official from considering reactions to speech that threaten public safety when restricting speech in a nonpublic forum?

PARTIES TO THE PROCEEDING

Petitioner is the Director of Revenue of the State of Missouri, defendant in the district court and cross-appellant in the court of appeals. The suit originally named as the defendant Quentin Wilson, the Director of Revenue at the time of filing of the complaint, solely in his official capacity. The current Director of Revenue is Carol R. Fischer. Pursuant to Supreme Court Rule 35.4, the Petitioner is identified by official title herein. Respondent is Mary E. Lewis.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. Respondent's Efforts to Obtain the ARYAN-1 License Plate 3

B. The Director's Reasons for Revoking the ARYAN-1 License Plate 4

C. The Court Opinions in this Case 6

REASONS WHY THE WRIT SHOULD BE GRANTED . 7

I. By removing an element from the test used to determine whether statutes affecting speech are unconstitutional on their face because of overbreadth, the Eighth Circuit creates a conflict with this Court's decisions and threatens many state laws. 8

A. The Eighth Circuit's decision parallels two Ninth Circuit decisions, reversed by this Court, holding statutes to be facially invalid when they

grant discretion to public officials but do not themselves preclude the officials from restricting speech based on viewpoint. 8

B. By ignoring the fundamental purpose of the facial invalidity doctrine, to prevent self-censorship or "chilling" of protected speech because of the overbreadth or vagueness of a statute, the Eighth Circuit creates a new, problematic test. 11

C. The Eighth Circuit's test jeopardizes not just personalized license plate statutes, but other statutes giving discretion to state and federal public officials. 16

II. By declaring that states cannot consider the possibility of violence resulting from speech in state-owned nonpublic fora, the Eighth Circuit departs from the Fifth Circuit's rule and jeopardizes the ability of the states to protect public safety. 18

A. Unlike the Eighth, the Fifth Circuit allows a state to refuse to put "hate" speech on government property because of the potential for a dangerous reaction. 19

B. This Court's precedent allows the government to consider the potential for a dangerous reaction to speech in a nonpublic forum. . . 20

C. The possibility of a dangerous reaction warrants this Court's review of the Eighth Circuit's extension of constitutional protection to "hate" speech on a state-produced and state-owned license plate. 25

CONCLUSION 26

APPENDIX 27

TABLE OF CONTENTS A-1

TABLE OF AUTHORITIES

CASES

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 10, 12, 13

Carr v. Director of Revenue,
799 S.W.2d 124 (Mo. Ct. App. 1990) 3

City of Lakewood v. Plain Dealer Publishing Co.,
486 U.S. 750 (1988) 15

Cohen v. California, 403 U.S. 15 (1971) 20

Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788 (1985) 21-23

Cox v. Louisiana, 379 U.S. 536 (1965) 10, 13

Elrod v. Burns, 427 U.S. 347 (1976) 17

Forsyth County, Georgia v. Nationalist Movement,
505 U.S. 123 (1992) 10

Gooding v. Wilson, 405 U.S. 518 (1972) 13

Grayned v. City of Rockford,
408 U.S. 104 (1972) 11

Kahn v. Department of Motor Vehicles,
16 Cal. App.4th 159,
20 Cal. Rptr.2d 6 (1993) 21

Lehman v. City of Shaker Heights,
418 U.S. 298 (1974) 23

Lewis v. Wilson, 253 F.3d 1077 (8th Cir. 2001) 1

Lewis v. Wilson,
89 F. Supp.2d 1082 (E.D. Mo. 2000) 1, 24

Los Angeles Police Dept. v. United Reporting Publishing Corp., 528 U.S. 32 (1999) ..... *passim*

Madsen v. Women's Health Center, Inc.,
512 U.S. 753 (1994) 23, 24

Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent,
466 U.S. 789 (1984) 11-13

National Endowment for the Arts v. Finley,
524 U.S. 569 (1998) ..... *passim*

New York Times Co. v. City of Lakewood,
1986 U.S. App. LEXIS 19078
(6th Cir. 1986) 15

Perry v. McDonald,
2001 U.S. App. LEXIS 22463
(2d Cir. 2001) 17, 21, 22

Perry Education Ass'n v. Perry Local Educators' Ass'n,
460 U.S. 37 (1983) 21-23

Planned Parenthood of Southern Nevada, Inc. v. Clark County School Dist.,
941 F.2d 817 (9th Cir. 1991) 23

Red Lion Broadcasting Co. v. FCC,
395 U.S. 367 (1969) 10

State of Texas v. Knights of the Ku Klux Klan,
58 F.3d 1075 (5th Cir. 1995) 18-21

CONSTITUTIONAL AND STATUTORY AUTHORITY

28 U.S.C. § 1254(1) 2

Constitution of the United States, Amendment I 2

Fla. Stat. § 636.016(1)(a)5 (2000) 18

Ga. Code Ann. § 33-24-10(5) (2000) 18

Mo. Rev. Stat. § 301.144.2 (2000) 2-4

Neb. Rev. Stat. § 44-1998(1)(b)(iii) (2001) 18

Ohio Rev. Code Ann. § 5120.426 (Anderson 2001) 17

Tenn. Code Ann. § 56-51-112(a)(1)(E) (2001) 17

Va. Code Ann. § 38.2-317.B.2 (2001) 18

Vt. Code R. 14-050-025 1.(f) (2001) 17

Vt. Stat. Ann., tit. 23, § 304(d) (2000) 16

OTHER

E.D. Mo. Local Rule 7-4.01(E) 7

IN THE
SUPREME COURT OF THE UNITED STATES

DIRECTOR OF REVENUE
OF THE STATE OF MISSOURI,
Petitioner,

vs.

MARY E. LEWIS,
Respondent.

On a Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

The Director of Revenue of the State of Missouri respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix ("App.") A-18 to A-25) is reported at 253 F.3d 1077. The opinion of the district court (App. A-2 to A-17) is reported at 89 F. Supp.2d 1082.

JURISDICTION

The court of appeals entered its judgment on June 12, 2001. The court of appeals denied a timely petition for rehearing on July 30, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Mo. Rev. Stat. § 301.144.2 (2000):

No personalized license plates shall be issued containing any letters, numbers or combination of letters and numbers which are obscene, profane, inflammatory or contrary to public policy. The director may recall any personalized license plates, including those issued prior to August 28, 1992, if he determines that the plates are obscene, profane, inflammatory or contrary to public policy. Where the director recalls such plates under the provisions of this subsection, he shall reissue personalized license plates to the owner of the motor vehicle for which they were issued at no charge, if the new plates proposed by the owner of the motor vehicle meet the standards established under this section. Nothing contained in this subsection shall be interpreted to prohibit the use of license plates, which are no longer valid for registration purposes, as collector's items or for decorative purposes.

STATEMENT OF THE CASE

All 50 states have "personalized" or "vanity" license plate programs in which vehicle owners may select the letters and numbers for their license plates. In every state, the statute authorizing such plates gives considerable discretion to the official who issues the plates, at most listing categories of prohibited plates or giving some instruction as to which plates will be issued or which will be refused. App. A-42 to A-50. Missouri's statute prohibits the Director of Revenue from issuing plate configurations that are "obscene, profane, inflammatory or contrary to public policy." Mo. Rev. Stat. § 301.144.2 (2000).

Pursuant to that mandate, the Missouri Department of Revenue refused to allow Respondent Mary E. Lewis to have a personalized plate reading "ARYAN-1." This case is Lewis's challenge to that decision.

A. Respondent's Efforts to Obtain the ARYAN-1 License Plate

Respondent Mary Lewis (then Mary Carr) first requested an "ARYAN-1" plate in 1983. App. A-18. The Director of Revenue was authorized to reject requests only if the proposed combination of letters and numbers were obscene or profane. *See* Mo. Rev. Stat. § 301.144.2 (1986). Lewis sued in state court, contending that the Director of Revenue lacked the power to deny her an "ARYAN-1" plate because the combination of letters and numbers was neither obscene nor profane. Missouri courts agreed, *Carr v. Director of Revenue*, 799 S.W.2d 124 (Mo. Ct. App. 1990), and the Director issued the "ARYAN-1" plate to Lewis.

Two years later, and apparently in response to the *Carr* ruling, the Missouri legislature amended the personalized plate

statute, authorizing the Director to reject plates that are inflammatory or contrary to public policy, as well as those that are obscene or profane. Mo. Rev. Stat. § 301.144.2 (2000).

The continued existence of the "ARYAN-1" plate came to the attention of the then-Director of Revenue in 1997 after a citizen complaint. The Director decided to recall the plate. 8th Cir. DOR App. 10-13, 19.[1] A Department administrator notified Lewis by letter that the plate would not be renewed because it was "contrary to public policy in accordance with the specifications set forth in the statutes." 8th Cir. Lewis App. 8. The letter did not state whether other statutory provisions were also applicable.

Lewis sought review of the Director's decision before Missouri's Administrative Hearing Commission. The Commission upheld the Director's decision. Lewis filed this suit in the U.S. District Court for the Eastern District of Missouri on September 25, 1998, seeking to again obtain the "ARYAN-1" plate.

B. The Director's Reasons for Revoking the ARYAN-1 License Plate

After receiving the 1997 complaint, the Director reviewed the matter with the Department of Revenue Motor Vehicle Policy Group. The Group included a traffic safety expert – a Missouri Highway Patrol captain. The Director of Revenue then decided to recall the ARYAN-1 plate because of

---

[1] The Director of Revenue's Appendix filed with the United States Court of Appeals for the Eighth Circuit in this case is referenced as "8th Cir. DOR App." The Respondent's Appendix in that court is referenced as "8th Cir. Lewis App."

concerns with public safety, that is, "road rage" that could result from drivers becoming angry at the sight of the plate.

When deposed in this case, the Director explained that the plate was contrary to public policy because of the risk that it could threaten public safety. 8th Cir. DOR App. 12, 27-28; 8th Cir. Lewis App. 27, 30-31. At least one plate configuration ("666") had already been banned because it had prompted angry reactions and egg-throwing. 8th Cir. DOR App. 12.

The Highway Patrol Captain on the Policy Group, in testimony found in his uncontroverted affidavit, also expressed concern with "road rage" and the "significant" risk to public safety. He noted that drivers who are incited by the "ARYAN-1" plate could not safely avert their eyes when they see the offending plate. He also testified that the fact that "ARYAN-1" was on state property like a license plate would make drivers even more upset than when an offensive phrase is on private property. 8th Cir. DOR App. 24-25.

During Lewis's deposition, she described at least ten incidents in which drivers of "18-wheel" trucks would blow their horns and wave their arms at Lewis in reaction to the "ARYAN-1" plate. 8th Cir. DOR App. 44-46. The Highway Patrol Captain believed that such incidents pose a danger whether the drivers' arms are being waved in support of or in opposition to the plate. 8th Cir. DOR App. 23-24. According to Lewis, none of these incidents resulted in accidents or collisions. She testified that she did not "drive that much," 8th Cir. DOR App. 44.

The court of appeals did not question the sincerity of the Director's explanation, nor her conclusion that road rage is a possible consequence of the "ARYAN-1" plate. App. A-22 to A-23.

C. The Court Opinions in this Case

The district court held that a license plate – produced and owned by the state – is a nonpublic forum. App. A-11. The court further held that the "contrary to public policy" part of the statute was unconstitutional because it was "unreasonable," and that because it was unconstitutional, it had to be "excised" from the license plate statute. App. A-15 to A-16. The district court stated that in doing so, it was not applying a void-for-vagueness or facial invalidity analysis. App. A-13. The district court did not grant Lewis's request for an injunction because the court concluded that Lewis had not challenged the "inflammatory" provision in the statute, which might support the Director's decision.

Lewis appealed to the U.S. Court of Appeals for the Eighth Circuit; the Director of Revenue cross-appealed.

Unlike the district court, the court of appeals explicitly engaged in a facial invalidity analysis, concluding that a statute that does not preclude viewpoint discrimination is unconstitutional. App. A-21. The court of appeals concluded that both the "contrary to public policy" and "inflammatory" provisions were invalid under that standard. App. A-22, A-24-25. The court further held that the statute was unconstitutionally applied because even in a nonpublic forum the state cannot restrict speech based on reactions unless the words reach the level of "fighting words" or the speaker "intentionally sought to provoke a violent reaction." App. A-23. The Eighth Circuit ordered a remand to the district court.[2]

---

[2] Additional detail can be found in the "Statement of Uncontroverted Facts" submitted to the district with the Director's Motion for Summary Judgment. App. A-27 to A-36. Because Lewis did not file any document purporting to controvert the Director's

REASONS WHY THE WRIT SHOULD BE GRANTED

The novel use of the "facial invalidity" doctrine by the U.S. Court of Appeals for the Eighth Circuit has implications far beyond whether one vehicle owner can choose one racially inflammatory license plate. The court's holding brings into question the constitutionality of personalized license plate statutes in all fifty states. Indeed, it calls into question other state and federal statutes that do not meet the new Eighth Circuit rule: if a statute does not on its face preclude the possibility that executive officials will engage in viewpoint discrimination, the statute is unconstitutional.

The Eighth Circuit bases its rule on the overbreadth doctrine. But that doctrine has heretofore been limited to cases in which persons could be sanctioned for violating a vague law. The sanctions have usually been in the form of criminal punishment. The Eighth Circuit's rule expands the overbreadth doctrine in a way that gives federal courts unprecedented power to repeal state and federal legislation. In that regard, the court's conclusion matches that found in two other federal appellate decisions in the last decade in which a court applied the overbreadth doctrine to statutes that imposed no criminal sanctions. This Court granted certiorari and reversed those two cases because there was not sufficient evidence of a "chilling" effect caused by the existence of allegedly vague statutes. Certiorari should be granted here as well.

This case may, in fact, be even more important than those. The Eighth Circuit establishes a new standard that severely limits the power of states to protect the health and safety of its citizens in nonpublic fora, including but not limited

---

asserted facts, they are "deemed admitted." E.D. Mo. Local Rule 7-4.01(E).

to highways. That standard – in contrast to a standard applied by the Fifth Circuit – precludes states from considering the collateral, public safety threat posed by words unless they rise to the level of "fighting words" or the speaker "intentionally sought to provoke a violent reaction." That limitation on the ability of states to protect the public merits this Court's consideration.

I. By removing an element from the test used to determine whether statutes affecting speech are unconstitutional on their face because of overbreadth, the Eighth Circuit creates a conflict with this Court's decisions and threatens many state laws.

A. The Eighth Circuit's decision parallels two Ninth Circuit decisions, reversed by this Court, holding statutes to be facially invalid when they grant discretion to public officials but do not themselves preclude the officials from restricting speech based on viewpoint.

The Eighth Circuit's test can be simply stated: a court must strike as facially unconstitutional any statute that restricts speech if there is nothing in the statute to prevent government officials from restricting speech based on the speaker's viewpoint. *See* App. A-21. That holding omits a key part of the rule set out by this Court – a rule applied in this Court's most recent overbreadth cases in a fashion that conflicts with the Eighth Circuit's rationale and result.

Twice in the last decade, a U.S. court of appeals held unconstitutional statutes granting discretion to public officials without containing prohibitions on viewpoint discrimination. In each case, this Court granted certiorari and reversed. *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528

U.S. 32 (1999) (*United Reporting*); *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (*Finley*).

In *Finley*, this Court considered the constitutionality of the Congressional directive that the National Endowment for the Arts, in considering grant applications, should "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public." 524 U.S. at 576. This phrase is comparable in specificity to the "contrary to public policy" phrase the Eighth Circuit struck. In the NEA statute, Congress did not define those "general standards," nor did it give substance to the concept of "respect" for beliefs and values. Yet this Court reversed the Ninth Circuit's finding of facial invalidity of the statute, stating that the delegation of authority to the agency "neither inherently interferes with First Amendment rights nor violates constitutional vagueness principles." *Id.* at 573.

This Court reversed the holding of another Ninth Circuit panel in *United Reporting*. There, a company challenged a public records statute that required persons seeking arrest records to declare that the information would not be used to sell a product or service. The company had previously obtained and sold such names to attorneys, driving schools, insurance companies, and others. The Ninth Circuit held that the statute was facially unconstitutional. This Court granted certiorari and reversed, holding the overbreadth doctrine inapplicable because there was no threat of criminal prosecution or other penalty that would "chill" protected speech by non-litigants. The Court specifically noted that the only burden the plaintiff faced was the prospect that a request for information would be denied, which was insufficient to invoke the overbreadth doctrine. 528 U.S. at 38-41.

The Eighth Circuit does not mention either *Finley* or *United Reporting*. Instead, it turns first to broad statements in

earlier decisions of this Court that, unlike Missouri's law, involved criminal statutes. Notable is this statement from *Cox v. Louisiana*, 379 U.S. 536, 557 (1965): "It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not . . . by use of a statute providing a system of broad discretionary licensing authority . . . ." *See* App. A-21. Then, from *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123, 129 (1992), the court of appeals extracts the conclusion that so long as there are not sufficient standards to preclude an official from discriminating based on viewpoint, "every application of the regulation 'creates an impermissible risk of suppression of ideas.'" App. A-21.

The rule cannot be stated so broadly when there is no threat of negative consequences or punishment, as *Finley* and *United Reporting* show. The National Endowment for the Arts was permitted by statute "to determine which expressions of view would be permitted" under government-funded arts programs. In fact, this Court recognized that there was a possibility of viewpoint discrimination under the National Endowment statute. 524 U.S. at 586-87, *citing Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 396 (1969). But that possibility did not lead this Court to conclude that the National Endowment statute was facially invalid. Nor did the possibility of viewpoint discrimination invalidate the law in *United Reporting*. Neither of those statutes could have passed the Eighth Circuit's test.

This Court has held that declarations that statutes are facially unconstitutional are to be used "sparingly and only as a last resort." *Finley*, 524 U.S. at 580, *quoting Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). *Finley* and *United Reporting* are consistent with that view. The Eighth Circuit's holding is not. By confusing the legal standards to be used in evaluating the constitutionality of personalized license plate and

other laws delegating authority related to speech in all fifty states, the Eighth Circuit's holding will lead to frequent and premature litigation over the constitutionality of statutes that merely fail to facially prevent unconstitutional application.

B. By ignoring the fundamental purpose of the facial invalidity doctrine, to prevent self-censorship or "chilling" of protected speech because of the overbreadth or vagueness of a statute, the Eighth Circuit creates a new, problematic test.

The reason for the holdings in *Finley* and *United Reporting* is apparent from comparing them to precedents on which they and the Eighth Circuit decision here rely – decisions establishing that in the First Amendment context, the overbreadth and vagueness doctrines are properly applied where there is something that no court found to exist here: "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court," *i.e.*, that it will "chill" speech protected by the First Amendment. *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798-801 (1984). That restriction is inextricably tied to the basic purposes of the vagueness and overbreadth doctrines. The Eighth Circuit has removed that restriction from the constitutional test.

1. *The overbreadth doctrine attacks the threat of government-encouraged self-censorship.*

The vagueness and overbreadth doctrines are distinct, although related and sometimes confused. The vagueness doctrine holds that a person cannot be punished if a statute is so vague that the defendant cannot determine what conduct is proscribed. The doctrine has a due process element. *Grayned*

v. City of Rockford, 408 U.S. 104, 108 (1972). The overbreadth doctrine, by contrast, goes to standing. It allows a court to strike down a statute when the risk to a citizen of violating the statute is so great that non-litigants are likely to refrain from engaging in constitutionally protected speech so as not to run afoul of the law–even if the litigant's rights were not violated. This rule is a departure from the "traditional rules of standing." *United Reporting*, 528 U.S. at 38; *Broadrick v. Oklahoma*, 413 U.S. at 612. The traditional rules "reflect[] two 'cardinal principles' of our constitutional order: the personal nature of constitutional rights and the prudential limitations on constitutional adjudications." *United Reporting*, 528 U.S. at 39.

Obviously the vagueness doctrine does not apply here; there is no threat of punishment. In fact, the district court specifically stated it was "not applying a void for vagueness or facial invalidity analysis," but "excised" the "contrary to public policy" phrase because it was "an unreasonably vague regulation of a nonpublic forum." App. A-13, A-16. The court of appeals apparently relies on the overbreadth doctrine, calling the statute "unconstitutionally broad." App. A-22.

In the First Amendment context, this Court has in the past held statutes to be overbroad only if their mere existence, as opposed to their application, inhibits or "chills" the speech of persons not before the Court. The danger must be realistic and "significantly compromise recognized First Amendment protections." *Taxpayers for Vincent*, 466 U.S. at 798-801. *Accord, Broadrick v. Oklahoma*, 413 U.S. at 612. This Court has found invalidation of statutes on overbreadth grounds to be necessary when "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of

application to protected expression." *Gooding v. Wilson*, 405 U.S. 518, 521 (1972).[3]

In each instance in which this Court found a realistic danger of self-censorship or inhibition, there was some risk of harm associated with engaging in the speech. Usually that consequence has been in the form of criminal charges, but at least there must be some serious consequence. *E.g., Broadrick*, 413 U.S. at 606 (statute limiting political activity by state employees with sanctions of dismissal or possible criminal sanctions; statute upheld); *Gooding*, 405 U.S. at 521 (finding breach of peace criminal statute overbroad); *Cox v. Louisiana*, 379 U.S. 536 (1965) (same).

This Court's recent decisions follow that approach. Thus in *Finley*, this Court found that the risk that grant applicants will steer clear of controversial art projects was not sufficient to trigger the facial invalidity doctrine. 524 U.S. at 588-89. The dissent there argued that the potential failure to obtain a grant constituted a "chilling." *Id.* at 621-22 (Souter, J.). But even the dissent recognized that there has to be some repercussion. *Id.* at 619-20.[4] Likewise, in *United Reporting* this Court emphasized that "chilling" is a prerequisite for an overbreadth claim. 528 U.S. at 40-41. The Court specifically noted that the only burden the plaintiff faced was the prospect

---

[3] In rare situations, a statute may be facially invalid because the statute could never be applied in a valid manner. *Taxpayers for Vincent*, 466 U.S. at 798. No one contends that this principle applies here.

[4] The concurring justices (Scalia, J., joined by Thomas, J.) stated that the statute mandated viewpoint discrimination, which was constitutional because the government can fund the programs it prefers. 524 U.S. at 590-600.

that a request for information would be denied, which was insufficient to invoke the overbreadth doctrine. *Id.* at 41.

2. The Eighth Circuit's new rule eliminates the requirement of a self-censorship effect.

The Eighth Circuit omits from its ruling any discussion of government-promoted self-censorship -- the sort of "chilling" effect this Court has found elsewhere. The court of appeals never addresses whether the Missouri law would promote self-censorship in the fashion this Court's precedents have contemplated. Nor does the court explain how the law could have such an effect.

Perhaps the court of appeals omits any reference to *Finley* or self-censorship because it recognizes that here there is no risk that non-litigants would be deterred from speaking by the mere existence of the restrictions on personalized plates. A vehicle owner can ask for any type of plate desired. The worst thing that can happen is that the Department of Revenue refuses the request and refunds the additional fee for a personalized plate. 8th Cir. DOR App. 17. A vehicle-owner is not punished or sanctioned for requesting a plate barred by the statute. The vehicle-owner faces the exact burden found insufficient in *United Reporting*: the applicant's request will be denied. Nor is there a repercussion like the funding cut-off found insufficient in *Finley*. But at this stage, the possible reasons for the Eighth Circuit's decision to omit any holding that speech would be "chilled" are less important than the simple fact that by eliminating that question, the court changed the test for overbreadth.

In making its leap to a new, shortened test, the court of appeals concludes that the facial invalidity doctrine "applies with as much force to civil statutes as it does to criminal laws." App. A-21. That is itself a novel conclusion, in contravention

of *Finley* (*see* 524 U.S. at 588) and not supported by the one case the Eighth Circuit cites, *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 764 (1988). *See* App. A-20.

In *Lakewood*, the Court neither explicitly nor implicitly erased the line between laws involving civil and those involving criminal penalties. At issue was an ordinance banning vending machines on sidewalks without permits, and giving the mayor discretion to issue the permits. By exercising that discretion, the mayor could pare the number of retail outlets available to a publisher who chose to criticize the mayor. That made the risk of inhibition or self-censorship obvious. But there was more: accompanying that possibility was a threat of criminal sanctions for violating the permit laws.[5] There is nothing in *Lakewood* discussing the application of the facial invalidity doctrine absent criminal penalties.

By relying on the overbreadth doctrine to entirely eliminate the line between civil and criminal statutes, the Eighth Circuit expands the doctrine far beyond the scope of *Lakewood* or any other precedent the court cites. And the Eighth Circuit interjects courts into the lawmaking process by effectively repealing duly-enacted laws with a declaration of facial invalidity. This Court should consider whether such interjection is appropriate, given its action in *United Reporting* and *Finley*.

---

[5] A newspaper company that chose to ignore the City of Lakewood's permitting statute was charged with 42 criminal complaints. *New York Times Co. v. City of Lakewood*, 1986 U.S. App. LEXIS 19078 (6th Cir. 1986).

C. The Eighth Circuit's test jeopardizes not just personalized license plate statutes, but other statutes giving discretion to state and federal public officials.

The impact of the Eighth Circuit's rule is not limited to the "ARYAN-1" license plate, not to Missouri law, nor even to license plate laws generally. If left undisturbed, it will have far-reaching consequences.

Laws in all 50 states will be threatened by the Eighth Circuit's test. Excerpts of the statutes are appended hereto. App. A-42 to A-50. Eight states give even more discretion to the executive officials than does Missouri – they give unfettered discretion (Arkansas, Connecticut, Delaware, Maryland, Massachusetts, North Dakota, Ohio, and Virginia). Twenty-five states bar "offensive" plates (Alabama, Alaska, Arizona, Colorado, Illinois, Indiana, Kentucky, Louisiana, Maine, Michigan, Mississippi, Montana, New Hampshire, New Jersey, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, and Wisconsin). Six states bar plates that demean or insult ethnic or racial groups (Alaska, Georgia, Idaho, Nevada, New York, Oregon). Tennessee, like Missouri, uses the phrase "contrary to public policy," and Hawaii uses the phrase "publicly objectionable." None of these statutes could meet the Eighth Circuit test; all of them could legitimately be accused of containing "nothing ... to prevent [the state] from denying [the applicant] the plate because of her viewpoint." App. A-21.

Vermont's law merits particular note. It permits the Commissioner of the Vermont Department of Motor Vehicles to "revoke any special plate that might be offensive or confusing to the general public." Vt. Stat. Ann., tit. 23, § 304(d) (2000). The U.S. Court of Appeals for the Second Circuit recently upheld a revocation under that statute without

even reaching the question of whether the statute is invalid because it gives the Commissioner such broad discretion. *Perry v. McDonald*, 2001 U.S. App. LEXIS 22463 (2d Cir. 2001). The Eighth Circuit's rule would require the opposite result.[6]

Moreover, the Eighth Circuit's new rule would appear to have consequences for other types of statutes – state and federal – that give discretion to executive officials. For instance, laws that make public employees "at-will" employees do not facially preclude the possibility of firing an employee for unconstitutional reasons, such as the employee's party affiliation. *E.g., Elrod v. Burns*, 427 U.S. 347 (1976) (First Amendment prohibits firing nonpolicymaking, nonconfidential employees based on party affiliation). But at-will employment statutes have not been declared facially unconstitutional simply because they do not preclude the possibility of a state action in violation of the First Amendment.

Statutes that do not expressly bar unconstitutional application appear in many contexts besides employment and license plates. For instance, Ohio allows prison officials to restrict access to "inflammatory" material. Ohio Rev. Code Ann. § 5120.426 (Anderson 2001). Numerous states give their insurance departments the power to disapprove insurance

---

[6] The Second Circuit was aware of the Eighth Circuit's holding. *See* 2001 U.S. App. LEXIS 22463 *28. It seems the court distinguished the cases because the Vermont Commissioner issued regulations limiting her discretion. *See* Vt. Code R. 14-050-025 1.(f), cited at 2001 U.S. App. LEXIS 22463 *28 n. 9. But the court, not presented with a facial challenge, did not explain how regula-tions, unilaterally issued and easily amendable by the official whose discretion lacks statutory constraint, lead to a result the opposite of that reached here. Moreover, by declaring the Missouri law unconstitutional on its face, the Eighth Circuit leaves no room for Missouri to save its statute by following the Vermont approach.

contract forms that are "contrary to public policy." *E.g.*, Fla. Stat. § 636.016(1)(a)5 (2000); Ga. Code Ann. § 33-24-10(5) (2000); Neb. Rev. Stat. § 44-1998(1)(b)(iii) (2001); Tenn. Code Ann. § 56-51-112(a)(1)(E) (2001); Va. Code Ann. § 38.2-317.B.2 (2001). Is it possible that government officials could engage in viewpoint discrimination under these statutes? Of course. But that has never been enough to render such laws unconstitutional.

The Eighth Circuit could have avoided adopting a rule that precludes such statutes, choosing to restrict itself to an "as-applied" theory such as the one addressed in Part II of its opinion. App. A-22 to A-24. By instead holding that the statute is invalid on its face because it does not expressly preclude officials from acting unconstitutionally, the court adopts a rule that changes the relationship of courts and executive officials in a way that has consequences for statutes related and unrelated to personalized license plates. That change merits review by this Court.

II. By declaring that states cannot consider the possibility of violence resulting from speech in state-owned nonpublic fora, the Eighth Circuit departs from the Fifth Circuit's rule and jeopardizes the ability of the states to protect public safety.

When it faced a state agency refusing to place an implicit message of racial hatred on state-owned property, the U.S. Court of Appeals for the Fifth Circuit applied a "reasonableness" test. *State of Texas v. Knights of the Ku Klux Klan*, 58 F.3d 1075, 1079 (5th Cir. 1995). The Eighth Circuit applies a very different standard, and reaches the opposite result. That standard itself presents a danger of "chilling" – but not the chilling required by the overbreadth doctrine. Rather, the Eighth Circuit test presents the danger that government officials charged with protecting the health and safety of the

public will be "chilled" or inhibited from taking action to save lives. That danger and the confusion created by the contrasting Eighth and Fifth Circuit holdings argue strongly in favor of this Court considering the correct rule for evaluating state decisions regarding the nature of speech they must permit on government-owned, nonpublic fora.

A. Unlike the Eighth, the Fifth Circuit allows a state to refuse to put "hate" speech on government property because of the potential for a dangerous reaction.

In *State of Texas v. Knights of the Ku Klux Klan*, Texas had refused to allow the Ku Klux Klan to "adopt" a highway near a housing project that was being desegregated. Participation would have meant the state would erect a sign along that portion of the highway crediting the KKK for cleaning that stretch of highway. The Fifth Circuit held that the KKK sign would "create unreasonable conflict." *Id.* at 1079. The Fifth Circuit stated that the KKK could use the sign to "discourage desegregation" and "impede the State's ability to encourage" compliance with the court-ordered desegregation. *Id.*

The Eighth Circuit considers similar points made by Missouri, but reaches the opposite conclusion. According to the Eighth Circuit, the state cannot restrict speech to prevent road rage – another form of "unreasonable conduct" – merely because the "road rage that might occur would result directly from the message of racial superiority that the plate would carry in the minds of some who read it." App. A-23. To justify its restriction on what is placed on a state-owned vanity plate, the state would have to prove "that Ms. Lewis has intentionally sought to provoke a violent reaction or has directed at a particular individual "personally abusive epithets which ... are ... inherently likely to provoke violent reaction" (*i.e.*, "fighting

words"), *Cohen v. California*, 403 U.S. 15, 20 (1971)." App. A-23.

To apply the Eighth Circuit test to the Texas facts would change the result. Among the problems in the Texas case that made the state's decision "reasonable" were those created from a "message of racial superiority that the [highway adoption sign] would carry in the minds of some who read it"[7] problems that the Eighth Circuit would say the state could not consider. App. A-23. On the other hand, to apply the Fifth Circuit test to the Missouri facts would also change the result. Nothing in the decisions of the district court or the Eighth Circuit suggests that the state's determination that the "ARYAN-1" plate could cause dangerous "road rage" was erroneous or unreasonable. And the court agrees that road rage was a conceivable consequence of the ARYAN-1 plate. App. A-23. Yet now, Eighth Circuit states are compelled to display dangerous hate speech merely because the danger is a primary, rather than a secondary effect of its display on a state-created and state-owned license plate.

B. This Court's precedents allow the government to consider the potential for a dangerous reaction to speech in a nonpublic forum.

In this Court's constitutional jurisprudence, the type of forum involved is critical when evaluating the constitutionality of a state's restriction on speech.

---

[7] *See* 58 F.3d at 1079 ("The posting of a sign outside of the Vidor project announcing the Klan's name would likely cause Vidor residents a great deal of anxiety."), 1080 ("project residents and their family members would be reluctant to use highways adopted by the Klan"; "If the Klan's name were placed on a sign near the entry to the project, the residents of the project would be forced to receive the message of the Klan's presence each time they wished to leave or return to their homes in the project.").

Traditional public fora are places in which there is a long tradition of assembly and debate, such as parks. Designated public fora are those in which the government has created a public place for expressive activity. When attempting to justify restrictions on speech in both types of public fora, the government must show that a content-based regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. *See Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-47 (1983).

Every other forum is a nonpublic forum. This Court has established a two-part test for determining whether restrictions on speech are permissible in such a forum: (1) Is the government action reasonable? (2) Is the government action viewpoint-neutral? *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 806 (1985); *Perry Education Ass'n*, 460 U.S. at 46 (1983).

Both the Fifth and the Eighth Circuits purport to apply the law regarding speech in a nonpublic forum. *See* 58 F.3d at 1078-79; App. A-20.[8] Yet the Eighth Circuit does not cite any

---

[8] The Second Circuit similarly held "that a Vermont vanity plate is a nonpublic forum," and thus that any restriction on the vehicle owner's choice of letters and numbers is permissible if it "is reasonable and viewpoint-neutral." *Perry v. McDonald*, 2001 U.S. App. LEXIS 22463 *18. By contrast, one court has stated that such plates do not constitute speech at all, but are at best expressive conduct. *Kahn v. Department of Motor Vehicles*, 16 Cal. App.4th 159, 166, 20 Cal. Rptr.2d 6 (1993).

Lewis did not contend on appeal that the district court erred in its conclusion that the license plate was a nonpublic forum. The Eighth Circuit expresses a reservation about whether the license plate is a public forum, comparing it to a bumper sticker. App. A-20. But a bumper sticker is not a public forum; it is private property.

of this Court's nonpublic forum cases in the analysis portion of its opinion. Elsewhere it cites one of those cases, but for the limited purpose of noting that the Director contended that the plate was a nonpublic forum. App. A-20, *citing Perry*, 460 U.S. at 46-47. In its analysis, the Eighth Circuit cites principles from this Court's public forum cases, applies them to a nonpublic forum, and thus virtually bars government officials from considering reactions to speech in nonpublic fora.

For the Eighth Circuit, then, it is not enough that the restriction is reasonable (it is reasonable to try to prevent highway accidents and deaths) and viewpoint-neutral (the decision was based on a desire to avoid highway carnage). Instead, the Eighth Circuit adds a new element to make the nonpublic forum test at least as strict as (and perhaps more strict than) the public forum test. The court holds that the government cannot consider the reaction in restricting speech unless the speech reaches the level of "fighting words" or the speaker intended to provoke a violent reaction. App. A-23. According to the Eighth Circuit, even in nonpublic fora "[t]he first amendment knows no heckler's veto." App. A-24. But the court of appeals cited only public forum cases for that proposition.

Limitations on personalized plates leave vehicle owners free to use bumper stickers to express their messages. *See Perry v. McDonald*, 2001 U.S. App. LEXIS 22463 *22 ("Vermont's policy does not prevent Perry from communicating any particular message on her automobile. For instance, Perry may display a bumper sticker . . . ."). The Second Circuit recognized that the primary purpose of the plates is vehicle identification and revenue generation, not speech. *Id.* at *20-21. Moreover, the broad discretion to restrict the content of the plates (about which Lewis complains) is inconsistent with an intention to create a designated public forum. *Id.* at *16-17.

In fact, this Court has repeatedly upheld the consideration of reactions to speech that fall far short of "fighting words." As this Court stated in *Cornelius*: "Although the avoidance of controversy is not a valid ground for restricting speech in a public forum, a nonpublic forum by definition is not dedicated to general debate or the free exchange of ideas. The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose." 473 U.S. at 811. This Court held that excluding political advocacy organizations from participation in the government's charitable fundraising drive to avoid controversy is reasonable. *Id.* at 813.

This Court has also permitted executive officials to consider reactions when it upheld as reasonable and not constituting viewpoint discrimination a school district's decision to permit only one bargaining group to use the school mail system – a decision made to "insur[e] labor peace" so that the schools would not become "a battlefield for inter-union squabbles." *Perry Education Ass'n*, 460 U.S. at 50-52 (1983). *Accord*, *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303-04 (1974) (upholding law barring political advertising on city buses; signs were not a forum; city could protect riders from the "blare of political propaganda" to prevent interference with a pleasant commute and the public's convenience, comfort, and safety); *Planned Parenthood of Southern Nevada, Inc. v. Clark County School Dist.*, 941 F.2d 817, 829 (9th Cir. 1991) (school publications found to be nonpublic fora could reject Planned Parenthood advertisements because they were controversial and could cause tension and anxiety).

This Court has upheld consideration of reactions to speech in a context demanding even more scrutiny than in a nonpublic forum. In *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), this Court upheld an injunction against antiabortion protestors that created a 36-foot "buffer zone"

around a clinic that performed abortions and barred singing, chanting, or other noises within earshot of persons inside the clinic. In upholding that portion of the injunction, the Court stated that it was imposing a stricter standard for an injunction than it would to legislative enactment. *Id.* at 764-65. The injunction was upheld in the interests of the health and well-being of patients who might suffer anxiety from the "cacophony of political protests." *Id.* at 758-59, 772-73.

This Court has never limited consideration of a listener's reaction to speech in a nonpublic forum to situations involving "fighting words."[9] Obviously the Fifth Circuit did not require "fighting words"; there was no such language on the signs the state refused to erect. The Eighth Circuit's contrasting import of a "fighting words" requirement into nonpublic forum jurisprudence merits this Court's review.

---

[9] The district court stated that "offensive" plates like "KIL-JEW" could be rejected as "fighting words," without requiring that the words be directed to an individual. 89 F. Supp.2d 1082, 1089-90, nn.6-7 (E.D. Mo. 2000). App. A-13. But the district court did not explain why "Aryan," a word that to some people is synonymous with "kill Jews," is not also a "fighting word." The Eighth Circuit opinion, unlike the district court opinion, raises the question of whether any license plate could meet the fighting words test the appellate court used: are the words "likely to provoke a violent reaction." App. A-23. If one passing motorist a year has a "road rage" reaction to a plate, is it "likely" to provoke a violent reaction? The court of appeals opinion suggests that under the First Amendment, plates that only occasionally provoke violent reactions and automobile collisions cannot be barred.

C. The possibility of a dangerous reaction warrants this Court's review of the Eighth Circuit's extension of constitutional protection to "hate" speech on a state-produced and state-owned license plate.

The impact of the Eighth Circuit's step – prohibiting state restrictions until the speech reaches the point of constituting "fighting words" – cannot be minimized. It seriously hinders the efforts of Missouri and other states to promote public safety, not only on the interstate highways, but in other contexts as well.

The Director here was faced with a plate that could be affixed to a vehicle traveling anywhere in the state, at any time. While this case was pending in the district court, newspapers ran prominent pictures of Buford Furrow in an "Aryan Nation" uniform when he was the suspect in the shooting of children in a Jewish community care center. 8th Cir. DOR App. 55-57. And the day those pictures ran, a driver with an ARYAN-1 plate could drive around Jewish communities. Prudent government officials should think about such possibilities in determining what the state puts on a license plate.

Whether the nonpublic forum is a school newspaper, an office mailbox, a charitable fundraising drive, or a vanity license plate, the ability of prudent government officials to protect the citizens of their states is significantly curtailed by the Eighth Circuit decision. This Court should not wait for another case before considering whether the court of appeals improperly restricted the government's ability to prevent road rage and other violent reactions to speech that threaten public health and safety.

CONCLUSION

To address the conflicts between the Eighth Circuit's rule and the precedents of this and other courts, and to preserve the ability of public officials to protect public safety, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General
JAMES R. LAYTON
State Solicitor
ERWIN O. SWITZER, III*
Special Chief Counsel
KRISTEN H. GARROWAY
Assistant Attorney General

Wainwright State Office Building
111 North 7th Street, Suite 204
St. Louis, Missouri 63101
(314) 340-6816

Counsel for Respondent,
Director of Revenue

* *Counsel of Record*

APPENDIX

TABLE OF CONTENTS

Mary E. Lewis v. Quentin Wilson, United States District Court, Eastern District, Eastern Division, Case No. 4:98CV-1610-SNL, Memorandum and Order of the Eastern District A-2

Mary E. Lewis v. Quentin Wilson, Director of Revenue, State of Missouri, United States Court of Appeals for the 8th Circuit, Case Nos. 00-2149/2181, Opinion of the 8th Circuit A-18

Mary E. Lewis v. Quentin Wilson, Director of Revenue, State of Missouri, United States Court of Appeals for the 8th Circuit, Case Nos. 00-2149/2181, Order Denying Petition for Rehearing and for Rehearing En Banc A-26

"Statement of Uncontroverted Facts" submitted by the Director of Revenue with his Motion for Summary Judgment filed in Mary E. Lewis v. Quentin Wilson, United States District Court, Eastern District, Eastern Division, Case No. 4:98CV-1610-SNL A-27

Full Text of Missouri's Personalized License Plate Statute–Mo. Rev. Stat. § 301.144 ..... A-37

Synopses of Personalized License Plate Statutes of the Fifty States A-42

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MARY E. LEWIS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 4:98CV-1610-SNL
	)	
QUENTIN WILSON,	)	
	)	
Respondent.	)	

MEMORANDUM AND ORDER

This matter is before the Court on cross-motions for summary judgment by the parties. Petitioner seeks summary judgment that respondent, in his official capacity as Director of Revenue of the State of Missouri (petitioner or Director), violated her federal Constitutional rights by denying her application for a personalized "vanity" automobile license plate. Respondent seeks summary judgment that the First Amendment does not require the State of Missouri to issue the plate.

Summary Judgment Standard

Courts have repeatedly recognized that summary judgment, like dismissal, is a harsh remedy that should be granted only when the moving party has established his right to judgment with such clarity as not to give rise to controversy. *New England Mut. Life Ins. Co. v. Null*, 554 F.2d 896, 901 (8th Cir. 1977). Summary judgment motions "can be a tool of great utility in removing factually insubstantial cases from crowded dockets, freeing courts' trial time for those that really do raise genuine issues of material fact." *Mt. Pleasant v. Assoc. Elec. Coop., Inc.*, 838 F.2d 268, 273 (8th Cir. 1988). But there must be absolutely "no genuine issue as to a material fact and the moving party [must be] entitled to judgment as a matter of law." *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 467, 82 S. Ct. 486 (1962).

In passing on a motion for summary judgment, the court must review the facts in a light most favorable to the party opposing the motion and give that party the benefit of any inferences that logically can be drawn from those facts. *Buller v. Buechler*, 706 F.2d 844, 846 (8th Cir. 1983). The court is required to resolve all conflicts of evidence in favor of the nonmoving party. *Robert Johnson Grain Co. v. Chem. Interchange Co.*, 541 F.2d 207, 210 (8th Cir. 1976). With these principles in mind, the Court will now turn to the factual history of the case.

Factual Background

In Missouri, all vehicles must be registered with the Department of Revenue (DOR). To legally operate a vehicle on the roads, the owner must obtain a valid Missouri license plate and attach it to the vehicle. Every year, the owner must renew her license plate with the DOR. In order to renew, the owner must present the DOR with proof of financial responsibility, an emission/safety inspection certificate and proof of insurance. Once these items are presented, the license plate is renewed for the next year. The standard Missouri license plate is a green, white and blue plate with a configuration of six characters: three numbers and three letters with a space in between the first three and last three characters.

In 1979, the Missouri State Legislature enacted Revised Missouri Statute Section 301.144 which created the personalized (vanity) license plate program in the state of Missouri. Under the vanity plate program, individual vehicle owners are permitted to choose for themselves, within the six character limit, any letter and number configuration for their license plates. The DOR charges an initial premium of $150.00 to obtain the vanity plate, and an additional $15.00 per year to renew it. The only limitations placed on the vehicle owner's free choice in purchasing a vanity plate are that the DOR may issue no duplicate plates, and that "[n]o personalized license plates shall be issued containing any letters, numbers or combination of letters and numbers which are obscene, profane, inflammatory or contrary to public policy." Mo. Rev. Stat. § 301.144.2 (West 1999). The vanity plate program generates roughly $2-3 million annually in revenue for the State of Missouri.

Apparently, the DOR has in place a multi-tiered procedure by which it reviews applications for vanity plates.[1] When the DOR receives an application, a clerk reviews it to determine whether the requested configuration is already taken or is on a list of impermissible configurations that have been denied in the past. This clerk also reviews the substance of the requested configuration, to determine whether the plate is "clearly and without question, obscene, profane, inflammatory or contrary to public policy." Affidavit of Teresa Tellman ¶ 13. If the clerk deems the configuration unacceptable for any of these reasons, she will then review any other configurations submitted by the applicant. If the applicant has submitted no other configurations, the clerk will return the application and fee with a letter explaining the reasons for denial. If other configurations are submitted, the clerk will review them in the same manner.

If the clerk approves the applicant's submitted configuration, she will then place that configuration on a list which is forwarded to a review committee. The review committee consists of Administrators of three bureaus within the DOR, including the Motor Vehicle Bureau, the Field Services Bureau, and the Alternative Funds Bureau. Each member of the review committee reviews the list of configurations, makes comments, and passes the list along to the next committee member. If the committee determines that a configuration is obscene, profane, inflammatory or contrary to public policy, it will inform the applicant that the requested configuration is denied. If the applicant has made a second choice, that configuration will go through the same review as the other plate. If the applicant made no second choice, the fee and application are returned. If the review committee finds that the requested configuration is not obscene, profane, inflammatory or contrary to public policy, the plate will be manufactured and issued to the applicant.

---

[1]In describing this procedure in his Statement of Uncontroverted Facts, the respondent failed to cite a single regulation governing this review system. Rather, respondent repeatedly cited to paragraphs ten through twenty-four of the affidavit of Teresa Tellman, Assistant Administrator of the Motor Vehicle Bureau of the Missouri Department of Revenue.

If the committee believes that the requested configuration is particularly problematic, the Director of the DOR may review the application along with a group known as the Motor Vehicle Policy Group. The Motor Vehicle Policy Group determines whether or not a plate should be issued with the requested configuration. If, after review with the Motor Vehicle Policy Group, the Director believes that the requested configuration is not obscene, profane, inflammatory or contrary to public policy and should be issued, a vanity plate bearing that configuration will be created and sent to the applicant. If the Director determines that the configuration should not be issued, the application will be denied.

From time to time, the DOR receives complaints regarding particular vanity plates that have been issued. When the DOR receives such a complaint, the General Counsel of the DOR reviews both the complaint and the configuration. The General Counsel then makes a decision as to whether or not to recall the plate because it violates the statute as being obscene, profane, inflammatory or contrary to public policy.

In June of 1986, the DOR issued petitioner a vanity plate bearing the words "ARYAN-1."[2] In September of that year, the DOR received a complaint about the plate. The DOR then sent petitioner a letter stating that it would not issue motor vehicle license plates if the letters or symbols thereon are obscene, profane or constitute fighting words. The letter further stated that the word "ARYAN" on petitioner's license plate constituted a fighting word, and directed petitioner to surrender the plate. Petitioner appealed that decision to the Administrative Hearing Commission.

Upon reaching the Administrative Hearing Commission, the DOR changed its position that the word "ARYAN" constituted a fighting word. Instead, the DOR relied on an argument that the plate violated a state regulation that no plate

---

[2]The Court's recitation of the procedural history of prior litigation between these parties related to the substance of this matter will be largely paraphrased from the opinion of the Missouri Court of Appeals in *Carr v. Director of Revenue*, 799 S.W.2d 124, 125 (Mo. Ct. App. 1990).

would be issued which was profane, obscene, inflammatory or patently offensive or otherwise conflicting with an overriding public policy. Mo. Code Regs. Ann. tit. 12, § 10-23.100 (6) (1986). The DOR took the position that the world "ARYAN" had been utilized by Adolf Hitler and the German Nazis during World War II to describe a so-called "master race," and to justify the extermination of a frighteningly large percentage of the world's Jewish population. For that reason, the DOR argued, the word conflicted with an overriding public policy. The Administrative Hearing Commission sustained the decision of the DOR, relying on Mo. Code Regs. Ann. tit. 12, § 10-23.100 (6) (1986).

Petitioner then appealed that decision to the Missouri Court of Appeals, where she argued that the scope of the regulation was broader than permitted under the enabling statute. At that time, Mo. Rev. Stat. § 301.144 (West 1986) stated the following:

> The director of revenue shall issue rules and regulations establishing the procedure for application for and issuance of the special personalized license plates and shall provide a deadline each year for the applications . . .. No two owners shall be issued identical plates and no plates shall be issued containing any profane or obscene word.

The Missouri Court of Appeals agreed with petitioner that the language of Section 301.144 was not broad enough to support a regulation which banned certain slogans from license plates because they were contrary to overriding public policy. The court ordered that the case be remanded to the Administrative Hearing Commission with directions to order the DOR to rescind its decision to revoke petitioner's license plate. *See Carr v. Director of Revenue*, 799 S.W.2d 124, 126 (Mo. Ct. App. 1990).

In response to the Carr decision, the Missouri State Legislature amended the language of Section 301.144 to its current status. That is, "no personalized license plates shall be issued containing any letters, numbers or combination of letters and numbers which are obscene, profane, inflammatory or

contrary to public policy." Mo. Rev. Stat. § 301.144.2 (West 1999) (Section 301.144.2). However, since 1992, petitioner has been in possession of the controversial "ARYAN-1" plate. In 1997, the DOR received an anonymous complaint letter from a person who had seen petitioner's plate and been offended. As a result, on June 3, 1997, Jannette Lohman, respondent's predecessor as Director of the DOR, reviewed the plate with the members of the Motor Vehicle Policy Group. Lohman herself found the slogan offensive, and the Motor Vehicle Policy Group agreed with her that the general public would also find the plate objectionable.

On June 17, 1997, the DOR advised petitioner by letter that her "ARYAN-1" license plate would not be renewed because it conveyed a message that is "contrary to public policy."[3] In reaching this decision, the DOR relied on Section 301.144.2. Petitioner now challenges the constitutional validity of that statute, arguing that it creates standardless discretion in the Director, who may accept or reject applications for vanity plates based not on clearly defined legal standards but rather on the basis of ad hoc determinations of what constitutes "public policy." Although it appears from the briefs that minor issues of fact may still exist in this case, the Court determined that those issues were not substantial or material, and thus removed the case from the trial docket and took it on the cross-motions for summary judgment.

Discussion

The First Amendment guarantees freedom of speech. However, it does not grant carte blanche for all speech under all circumstances. *See Cornelius v. NAACP Legal Defense and*

---

[3]Interestingly, respondent now appears to argue not that the slogan "ARYAN-1" itself espouses a viewpoint that is contrary to public policy, but rather that the words may incite other drivers on the highway to commit acts of retribution or so-called "road rage," which in turn violates public policy. It seems to the Court that such an argument might relate more closely to the "inflammatory" prong of Mo. Rev. Stat. § 301.144.2. However, respondent limits his argument to the "public policy" prong, and the Court will therefore limit its review to that portion of the statute.

Educational Fund, Inc., 473 U.S. 788, 799, 105 S. Ct. 3439, 3447 (1985). Rather, a governmental entity may "preserve the property under its control for the use to which it is lawfully dedicated." *Id.*, 473 U.S. at 800, 105 S. Ct. at 3448. In determining whether governmental regulation of putative speech is permissible, the Court must undertake three discrete steps. First, the Court must determine whether the subject of the analysis is speech at all. Second, the Court must determine the nature of the governmentally created forum. Finally, the Court must assess whether the regulation satisfies the requisite standard. *Cornelius*, 473 U.S. at 797, 105 S. Ct. at 3446.

A. Speech

In this case, the parties seem to agree that speech, or at least expressive conduct giving rise to some level of First Amendment scrutiny, is present.[4] The Court believes this conclusion to be inescapable. In order to find speech, "there must exist both an intent to convey a particularized message and a great likelihood that this message will be understood." *Missouri ex rel. Missouri Highway & Transp. Comm'n v. Cuffley*, 927 F. Supp. 1248, 1254 (E.D. Mo. 1996), rev'd on other grounds, *112 F.3d 1332 (8th Cir. 1997)* (Cuffley I). The Court must look to the nature of the activity in conjunction with the factual context and environment in which it is undertaken. *Spence v. Washington, 418 U.S. 405, 410-11, 94 S. Ct. 2727, 2730 (1974).*

Here, the purpose claimed by the DOR for maintaining the vanity plate program (i.e. to raise revenue and provide identification for vehicles) could certainly be maintained by the traditional manner of licensing automobiles. However, the State of Missouri has intentionally created an opportunity for

---

[4]Respondent does make the argument at one point in his Memorandum of Law in Support of His Motion for Summary Judgment that the vanity plate program does not constitute a medium of expression at all. In support of his argument that no speech is involved, respondent cites *Kahn v. Dep't of Motor Vehicles*, 16 Cal. App. 4th 159, 20 Cal. Rptr. 2d 6 (Cal. Ct. App. 1993). In spite of this argument, respondent concedes that there is enough expression present here to trigger some form of First Amendment analysis.

individuals to identify their vehicles through a particularized message. It seems doubtful that this program would generate the substantial revenue that it does if purchasers of vanity plates did not believe there to be a great likelihood that their messages would be understood. These messages are literally conveyed throughout the state upon the vehicles which they identify. Therefore, it appears that the parties are correct in assuming that speech is involved and First Amendment protection is triggered here.

B. Forum

Having determined that speech is involved in this case, the Court must next determine the nature of the speech forum created by the government. Courts have traditionally recognized three types of fora. The first and oldest type of forum is the "traditional public forum," such as a park, street corner or town square which "by long tradition or by government fiat has been devoted to assembly and debate." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 954 (1983). The second type of governmental forum is the "designated public forum," a location or channel of communication designated by the government for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects. *Perry*, 460 U.S. at 45-46, 103 S. Ct. at 955. The third type of governmental forum, the "nonpublic forum," is defined by what it is not. Any forum which is not by tradition or designation a forum for public communication is a nonpublic forum. *Perry*, 460 U.S. at 46, 103 S. Ct. at 955.

The significance of the classification of the forum lies in the level of scrutiny the Court applies to the regulation of each different type. If the Court determines that the vanity plate program establishes a traditional public forum, then the Court will apply strict scrutiny. That is, any regulation of speech must be narrowly tailored to serve a significant governmental interest and leave open ample alternative channels of communication. *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 132, 101 S. Ct. 2676, 2686-87 (1981). If the Court determines that the program establishes a limited or designated public forum, then the Court will apply intermediate scrutiny. Any regulation must further a compelling government interest in a way that is tailored similarly narrowly as in a

traditional public forum. *See Widmar v. Vincent*, 454 U.S. 263, 269-70, 102 S. Ct. 269, 274-75 (1981). Finally, if the Court determines that the program creates a nonpublic forum, then the scrutiny will be limited to rationality and viewpoint neutrality. *See Cornelius*, 473 U.S. at 800, 105 S. Ct. at 3448. That is, the government may regulate the program by any reasonable and viewpoint neutral means.

Respondent argues that this case actually falls into a fourth category -- no forum at all -- citing *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 118 S. Ct. 1633 (1998). *Forbes* involved an attempt by a third-party candidate to participate in a political debate sponsored by an Arkansas public television broadcaster. The Supreme Court explained that, as a general rule, because of the scarcity of the broadcast medium, and the importance of editorial control of that medium, broadcasting is not appropriate for scrutiny under the forum doctrine. *See Forbes*, 523 U.S. at ___, 118 S. Ct. at 1640. However, the Supreme Court determined that the debate itself constituted a nonpublic forum, and that because of the vital importance of debates to the political process, this should be recognized as an exception to the rule against applying forum doctrine in the public broadcasting context. *Id.*, 523 U.S. at ___, 118 S. Ct. at 1643. The Supreme Court found that the broadcaster had put forth a reasonable and viewpoint neutral reason for excluding Forbes from the debate. Forbes had practically no popular support, and his inclusion in the debate would have reduced the already limited amount of time available for the viable candidates to express their positions. Therefore, the Court found the broadcaster's exclusion of Forbes from the nonpublic forum (i.e. the debate) to have been a reasonable and viewpoint neutral exercise of regulation.

The Eighth Circuit Court of Appeals recently applied Forbes in a case arising in this district. In *Knights of the Ku Klux Klan v. Curators of the University of Missouri*, 2000 WL 189834 (8th Cir., Feb. 17, 2000), the Eighth Circuit addressed the question of whether or not a public radio broadcaster could exclude a group that wished to underwrite a segment of the National Public Radio news-show All Things Considered. The district court found no justification for applying the Forbes exception to the rule against utilizing forum analysis in broadcasting cases. *See Knights of the Ku Klux Klan v. Bennett*,

29 F. Supp. 2d 576, 583 (E.D. Mo. 1998). Therefore, the district court concluded that the enhanced underwriting program maintained by the broadcaster to raise funds for its operations was not a forum. The Court of Appeals affirmed that decision, finding that the underwriting acknowledgments at issue in the case constituted governmental speech subject to the broadcaster's editorial control.

The Court does not believe that either *Forbes* or *Knights of the Ku Klux Klan v. Curators of the University of Missouri* applies in this case. This case does not involve broadcasting, or any element of editorial control. The only natural or inherent constraint upon the message selected by a purchaser of a vanity plate is that it be six characters or less in length. That constraint calls for no editorial discretion by the Director whatsoever. Either the message fits on the plate or it does not. Therefore, this case is not subject to the Supreme Court's and the Eighth Circuit's admonitions that the "public forum doctrine should not be extended in a mechanical way to the very different context of public . . . broadcasting." *Curators*, 2000 WL 189834 at *6 quoting *Forbes*, 118 S. Ct. at 1639. This case does not involve broadcasting of any sort. Rather, the Court here is stuck with the forum analysis.[5]

This Court does not believe that the vanity plate program establishes either a traditional or designated public forum. A license plate is certainly not analogous to a park or street corner, nor is it analogous to a school auditorium which might be made available to certain speakers. Vanity license plates involve only the most limited and superficial degree of discourse. However, by allowing drivers to put some individualized message out there, the government is creating an opportunity for expression not otherwise available. Therefore, by process of elimination, the Court concludes that this case involves a nonpublic forum, and will apply rationality review.

---

[5]The Court is encouraged by the fact that at least two other federal district courts have previously addressed license plate cases using the public forum analysis. *See Sons of Confederate Veterans, Inc. v. Glendening*, 954 F. Supp. 1099 (D. Md. 1997); *Pruitt v. Wilder*, 840 F. Supp. 414 (E.D. Va. 1994).

C. First Amendment Scrutiny

The Court must now determine whether respondent's revocation of petitioner's vanity plate was a reasonable and viewpoint neutral government action. Petitioner argues both that respondent's application of Section 301.144.2 to her license plate is unconstitutional viewpoint discrimination, and that the statute is unconstitutional on its face because it grants limitless discretion to the Director in deciding which proposed license plates violate public policy and which do not. Respondent argues that Section 301.144.2 is a reasonable time, manner and place regulation, necessary to maintain safety on the roadways of Missouri. Respondent further argues that the decision to revoke petitioner's plate was not so subjective as to be arbitrary. Instead, the decision was reviewed at several levels within the DOR and was based on knowledge, experience and common sense. Finally, respondent argues that if the Court orders it to issue a license plate which says "ARYAN-1," there may be no limits on what else may be issued.[6]

In the first place, the Court believes respondent's argument that Section 301.144.2 is a reasonable and viewpoint neutral safety regulation reveals the problem with the "public policy" language in Section 301.144.2. Before the Administrative Hearing Commission, respondent argued that the term "ARYAN-1" was against public policy because it advocated the superiority of one race over others. See Exhibit 2 to Petitioner's First Amended Complaint. However, in briefing the matter for this Court, respondent dropped the argument that the term itself was against public policy in favor of an argument that the potential inflammatory effects of the license plate were against public policy. Respondent might have simply relied upon the "inflammatory" prong of Section 301.144.2 in the first place, but instead he changed his argument. This was possible only because the public policy language of the statute is too broad. Furthermore, respondent's change in strategy appears to the Court to have been an attempt to take the case out of the viewpoint discrimination context by

---

[6]The DOR suggests such offensive hypotheticals as "KIL-BLK," and "KIL-JEW."

arguing that respondent is not targeting petitioner's beliefs.[7] Because the meaning of the phrase "contrary to public policy," is so nebulous and malleable, respondent can argue that it means anything presently politically expedient. A governmental entity may not avoid a claim of viewpoint discrimination simply by drafting legislation so broad or vague as to apply to anything convenient.

The Court similarly rejects respondent's argument that constitutional vagueness doctrine does not apply in this case because Section 301.144.2 involves no threat of criminal sanction. *See Hynes v. Mayor and Council of the Borough of Oradell*, 425 U.S. 610, 620, 96 S. Ct. 1755, 1760 (1976). In finding the public policy language of Section 301.144.2 unreasonable, the Court is not applying a void for vagueness or facial invalidity analysis. Rather, the Court finds the "public policy" provision of 301.144.2 to be an unreasonably vague regulation of a nonpublic forum, which in effect creates standardless discretion in a government official. In doing so, the Court recognizes the standards for vagueness applied in other constitutional contexts. In order to be constitutionally specific, a statute must provide standards for those who enforce its provisions. *See Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294 (1972). The "public policy" provision in Mo. Rev. Stat. § 301.144.2 relied upon by the Director here does not.

The Court appreciates the DOR's concern for public safety. Such a concern is certainly legitimate, and the policy concerning safety on Missouri's roadways should be furthered. However, reasonableness of regulation must be determined in the context of the purpose which the forum at issue serves. *Perry*, 460 U.S. at 49, 103 S. Ct. at 957. Section 301.144.2 serves the purpose of raising funds for the State of Missouri and allowing motorists to identify their vehicles in a particularized

---

[7]Although the Court makes no ruling on the constitutionality of any prong of Section 311.144.2 other than the "public policy" provision, it would appear to the Court that the highly offensive hypothetical vanity plates proposed by the DOR in its brief could easily and permissibly be denied as "fighting words" under the inflammatory prong of the statute.

manner which they choose. Although Captain Billy Nelson, a veteran officer of the Missouri Highway Patrol, testified that a driver averting his or her eyes from the roadway for even a few seconds creates a heightened danger on the highways, the same could be said for any vanity plate which prompts another driver to read it.[8] And road rage or acts of vehicular aggression are presumably already punishable under other Missouri laws. Therefore, the respondent cannot reasonably rely upon this prior restraint to protect the public from otherwise illegal acts of retribution. *See Cohen v. California*, 403 U.S. 15, 23, 91 S. Ct. 1780, 1787 (1971). In enforcing the unreasonably broad and vague "public policy" provision of Section 301.144.2, respondent violated petitioner's constitutional right to free speech. Therefore, the Court will grant petitioner's prayer for declaratory relief.

D. Other Remedies

Having determined that petitioner's rights were violated, the Court must now address the issue of whether petitioner is entitled to the relief she seeks other than declaratory relief. The Court will first address petitioner's prayer for injunctive relief. Petitioner seeks an injunction against respondent in the form of a writ of prohibition, requiring respondent to issue the requested vanity plates. As the Court pointed out above, petitioner only challenged the "public policy" provision of Section 301.144.2, and thus that was the only prong of the statute the Court analyzed.

Missouri law provides for the severability of all remaining constitutionally sound provisions of a statute part of which has been declared unconstitutional. See Mo. Rev. Stat. § 1.140 (West 1969). The Court may uphold the remainder of the statute if it "is in all respects complete and susceptible of constitutional enforcement" and the Court concludes that it would have been adopted even if it had been known that the

---

[8]In ruling on this summary judgment motion, the Court makes no finding of fact regarding whether or not there is a likelihood that petitioner's "ARYAN-1" license plate would increase the risk of harm on Missouri's roadways. However, the Court does note that it is undisputed that plaintiff carried the plate on her vehicle without incident for a number of years.

"excluded portion was invalid." *Millsap v. Quinn*, 785 S.W.2d 82, 85 (Mo. 1990) (en banc). Here, it appears that Section 301.144.2 is complete without the "contrary to public policy" language. The Court may presume that the legislature would have passed the statute without that language, because the legislature did so, only adopting the unconstitutional language in 1992. Therefore, because the Director might still have constitutionally permissible grounds for denying or revoking petitioner's vanity plate, the Court will deny petitioner's prayer for injunctive relief.

Finally, the Court will turn to petitioner's prayer for attorney's fees pursuant to 42 U.S.C. § 1988 (Section 1988). Section 1988 provides for an award of "reasonable attorney's fees as part of the costs" to the "prevailing party" in an action to enforce 42 U.S.C. § 1983. "To qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of [her] claim." *Farrar v. Hobby*, 506 U.S. 103, 111, 113 S. Ct. 566 (1992). The "moral satisfaction" of a declaration such as that obtained by petitioner is not sufficient to confer prevailing party status on a plaintiff. *See Hewitt v. Helms*, 482 U.S. 755, 762-63, 107 S. Ct. 2672 (1987). As petitioner failed to obtain the injunction she sought, the Court cannot find her to be a prevailing party. Accordingly, petitioner's prayer for attorney's fees will be denied.

Conclusion

The "contrary to public policy" language in Section 301.144.2 is an unreasonable restriction on free speech. It lacks sufficient specificity to provide the government officials charged with applying it any guidance. Instead, those officials are left with the discretion to make ad hoc determinations based on subjective and undefined principles which could change from one day to the next. Furthermore, the challenged language is designed to target particular viewpoints -- those which are contrary to public policy. The unconstitutional language is not saved by the fact that it was drafted broadly enough so that the targeted viewpoint might not always be the same one. The First Amendment does not allow the state legislature to imbue certain officials with the authority to make subjective determinations of which viewpoints comport with public policy and which do not. However, the Court need not throw out the baby with the bath water. The unconstitutional language may

be excised from the statute without rendering the rest of it meaningless. Therefore, there may still be constitutional grounds for the Director to take the action challenged in this case. The Court will not enjoin the Director from taking that action before it has the opportunity to do so constitutionally.

ORDER

IT IS HEREBY ORDERED that Petitioner's Motion for Summary Judgment (# 34) is **GRANTED** in part and **DENIED** in part.

IT IS FURTHER ORDERED that Respondent's Motion for Summary Judgment (# 26) **DENIED**.

IT IS FURTHER ORDERED that declaratory judgment is entered for petitioner that respondent violated her constitutional rights by revoking her vanity plates under the "public policy" prong of Mo. Rev. Stat. § 301.144.2.

IT IS FURTHER ORDERED that petitioner's prayer for injunctive relief is **DENIED**.

IT IS FURTHER ORDERED that each side shall bear its own costs and fees in this matter.

IT IS FINALLY ORDERED that, as the Court's action of this date completely disposes of all issues in this matter, the matter is **DISMISSED**.

Dated this 29th Day of March, 2000.

Stephen N. Limbaugh
SENIOR UNITED STATES DISTRICT JUDGE

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

Nos. 00-2149/2181

Mary E. Lewis,	*	
	*	
Appellant/Cross-Appellee,	*	
	*	
v.	*	Appeals from the United
	*	States District Court for
	*	the Eastern District of
Quentin Wilson,	*	Missouri
In His Official Capacity	*	
as Director of Revenue of	*	
the State of Missouri,	*	
	*	
Appellee/Cross-Appellant.	*	

Submitted: March 14, 2001

Filed: June 12, 2001

Before MORRIS SHEPPARD ARNOLD and HEANEY, Circuit Judges, and BATTEY,[1] District Judge.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

When Mary Lewis requested a Missouri license plate with the letters "ARYAN-1" in 1983, the Missouri Department of Revenue (DOR) rejected her application. Because the relevant state law in effect at the time permitted the DOR to reject only those requests that were for plates that were obscene

---

[1]The Honorable Richard H. Battey, United States District Judge for the District of South Dakota, sitting by designation.

or profane, Ms. Lewis sued the DOR, contending that the plate that she requested was neither. Ms. Lewis prevailed, see *Carr v. Director of Revenue, 799 S.W.2d 124 (Mo. Ct. App. 1990),* and the DOR issued her the "ARYAN-1" plate in 1990.

Two years after the Carr decision, and evidently in response to it, the Missouri legislature amended the law to state that "[n]o personalized license plates shall be issued ... which are obscene, profane, *inflammatory or contrary to public policy*" (emphasis supplied), *see* Mo. Rev. Stat. § 301.144.2. Two years later still, the DOR received an anonymous letter complaining about Ms. Lewis's plate, and the director of the DOR subsequently decided not to reissue it because, as the DOR's letter to Ms. Lewis put it, the DOR had "determined that the configuration 'ARYAN-1' is contrary to public policy in accordance with the specifications set forth in the statutes."

Ms. Lewis appealed to the Missouri Administrative Hearing Commission, see Mo. Rev. Stat. § 621.050.1, which affirmed the DOR's decision. Ms. Lewis then sued the DOR in federal court, contending that the statute authorizing the DOR to refuse to reissue her plate violates the first amendment because it is vague or overbroad, or permits the state to engage in viewpoint discrimination.

On cross-motions for summary judgment, the district court concluded that the DOR's refusal to renew Ms. Lewis's license plate on the ground that it was "contrary to public policy" was unconstitutional. *See Lewis v. Wilson, 89 F. Supp. 2d 1082, 1089-91 (E.D. Mo. 2000).* The district court refused, however, to grant an injunction requiring the DOR to issue the plate, *see id.* at 1091, and also refused to grant Ms. Lewis attorney's fees pursuant to 42 U.S.C. § 1988(b), *see id.* This appeal followed. We affirm the district court's finding of unconstitutionality, but remand the case for the entry of an injunction requiring the DOR to reissue the "ARYAN-1" plate to Ms. Lewis and for an order granting Ms. Lewis attorney's fees.

I.

Although the district court agreed with Ms. Lewis that the Missouri statute allowing the DOR to refuse to issue license plates that are "contrary to public policy" was

unconstitutionally overbroad, *see Lewis*, 89 F. Supp. 2d at 1090, the court refused to grant Ms. Lewis an injunction, believing that the DOR might have other, constitutional, reasons for rejecting the plate, *see id.* at 1091. We review de novo the district court's legal conclusions, *see United States v. McMasters*, 90 F.3d 1394, 1397 (8th Cir. 1996), *cert. denied*, 519 U.S. 1071, 1099 (1997), but review the denial of an injunction for an abuse of discretion, *see International Association of Machinists and Aerospace Workers v. Soo Line Railroad Co.*, 850 F.2d 368, 374 (8th Cir. 1988) (*en banc*), *cert. denied*, 489 U.S. 1010 (1989).

We ask first whether the DOR's refusal to renew the license plate violated Ms. Lewis's first amendment rights. Because the state of Missouri technically owns the physical metal plate on which Ms. Lewis's message is displayed, the DOR maintains that the plate is a nonpublic forum which gives the state at least a limited right to control the message that the plate contains. *See Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 46-47 (1983). We express some initial skepticism about characterizing a license plate as a nonpublic forum, because it occurs to us that a personalized plate is not so very different from a bumper sticker that expresses a social or political message. The evident purpose of such a "forum," moreover, if it is one, is to give vent to the personality, and to reveal the character or views, of the plate's holder. In any case, we need not determine precisely what kind of forum, if any, a personalized license plate is because the statute at issue is unconstitutional whatever kind of forum a license plate might be.

A restriction on speech is constitutional only if certain principles are adhered to. Among these principles is a requirement that the restriction be specific enough that it does not delegate unbridled discretion to the government officials entrusted to enforce the regulation. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 764 (1988). This case resembles cases like *Cox v. State of Louisiana*, 379 U.S. 536 (1965), that involve statutes requiring a speaker to obtain official permission to engage in a particular type of speech: In *Cox*, 379 U.S. at 556, permission was required to have a parade, and here permission is required to display a message on a

license plate. In both *Cox* and this case the relevant statute gave little guidance to the officer entrusted to grant this permission.

These types of laws have generally been held to violate the first amendment. "It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not ... by use of a statute providing a system of broad discretionary licensing power," *id.* at 557. Where a regulation requires that a speaker receive permission to engage in speech, the official charged with granting the permission must be provided specific standards on which to base his or her decisions. *See Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123, 131 (1992). Without such standards, every application of the regulation "creates an impermissible risk of suppression of ideas," *id.* at 129. Contrary to the DOR's assertion, this principle applies with as much force to civil statutes as it does to criminal laws. *See, e.g., Plain Dealer*, 486 U.S. at 764.

For Ms. Lewis to succeed in her challenge to the provision of the statute allowing the rejection of a message because it is "contrary to public policy," she need not show that she was denied the "ARYAN-1" plate because of her viewpoint. "[T]he success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so," *Nationalist Movement*, 505 U.S. at 133 n.10. Ms. Lewis, therefore, need show only that there was nothing in the ordinance to prevent the DOR from denying her the plate because of her viewpoint.

We see nothing in § 301.144.2 that prevents the DOR from denying Ms. Lewis the "ARYAN-1" plate because of her viewpoint. The Missouri statute simply authorizes the DOR to reject license plates bearing messages that are "contrary to public policy," language that gives the DOR nearly unfettered discretion in choosing what license plates should be rejected and in deciding what alleged "public policy" supports its decision. As the district court noted, this phrase "is so nebulous and malleable [that it could mean] anything presently politically expedient," *Lewis*, 89 F. Supp. 2d at 1090.

The DOR's actions have themselves supplied proof that the phrase is unconstitutionally broad. The DOR first maintained that the word "Aryan" was itself contrary to public policy because of the message of racial superiority that the DOR asserts that the use of the word "Aryan" implies. *See id.* at 1086 n.3, 1089. As the controversy with Ms. Lewis progressed, however, the DOR changed its "public policy" basis to the present one, namely, that of promoting highway safety by rejecting license plates that could incite so-called road rage, *see id.* at 1086 n.3, 1089-90.

The very fact that the DOR could so readily switch justifications for its rejection of the plate illustrates the constitutional difficulty with the statute. The DOR's first justification was one that, if not blatant viewpoint discrimination, certainly could reasonably appear to have been based on the viewpoint of the speaker. A public official with even marginal creative ability could frequently invent a "public policy" basis for rejecting a plate containing a message with which he or she disagrees. This language thus "creates an impermissible risk of suppression of ideas," *Nationalist Movement*, 505 U.S. at 129, and we therefore affirm the district court's conclusion that the section of § 301.144.2 allowing license plates to be rejected as "contrary to public policy" violates the first amendment.

II.

We also conclude that the application of the statutory language to Ms. Lewis's case violated the first amendment. The DOR contends that it rejected Ms. Lewis's plate to prevent the occurrence of road rage, a contention that we assume for purposes of this opinion is subjectively sincere. According to the DOR, drivers who are exposed to the "ARYAN-1" plate may become angry, resulting in road rage and thus creating a traffic hazard. *See Lewis*, 89 F. Supp. 2d at 1086 n.3, 1089.

The DOR believes that its concern with highway safety rather than the mere offensiveness of the "ARYAN-1" plate's message brings this case within the rule of *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), and cases like it. In *Pap's*, 529 U.S. at 293, 296 (plurality opinion), the Supreme Court upheld a ban on nude dancing where the city showed that the ban was enacted to prevent certain undesirable secondary effects, such

as prostitution and crime, and was not primarily aimed at suppressing the message conveyed by nude dancing. We disagree with the DOR's contention. While restrictions of speech because of the secondary effects that the speech creates are sometimes permissible, an effect from speech is not secondary if it arises specifically from the content of the speech. *See Boos v. Barry*, 485 U.S. 312, 321 (1988) (opinion of O'Connor, J.); *see also id.* at 334 (Brennan, J., concurring in part).

The DOR contends that Ms. Lewis's plate may be regulated because it is likely to provoke a violent response. We think, however, that "[t]he only reason why [this] expressive conduct would be especially correlated with violence is that it conveys a particularly odious message; because the 'chain of causation' thus necessarily 'runs through the persuasive effect of the expressive component' of the conduct" (emphasis in original), the possibility for violence is a primary effect of the message itself. *See R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 394 n.7 (1992), quoting Justice Souter's concurrence in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 586 (1991). While we do not disagree with the DOR that road rage is a conceivable consequence of the "ARYAN-1" plate, any road rage that might occur would result directly from the message of racial superiority that the plate would carry in the minds of some who read it. Road rage, therefore, is a primary effect of the plate, a distinction that prevents the statute from being saved under the "secondary effects" rationale of cases like *Pap's*.

Without evidence that Ms. Lewis has intentionally sought to provoke a violent reaction or has directed at a particular individual "personally abusive epithets which ... are ... inherently likely to provoke violent reaction" (i.e., "fighting words"), *Cohen v. California*, 403 U.S. 15, 20 (1971), the mere possibility of a violent reaction to Ms. Lewis's speech is simply not a constitutional basis on which to restrict her right to speak. *See id.* at 23; *see also Nationalist Movement*, 505 U.S. at 134-35. "The argument amounts to little more than the self-defeating proposition that to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the States may more appropriately effectuate that censorship themselves,"

Cohen, 403 U.S. at 23. Even if we assume that the DOR made no judgment about the viewpoint of Ms. Lewis's speech, therefore, we reject its attempt to censor Ms. Lewis's speech because of the potential responses of its recipients. The first amendment knows no heckler's veto.

III.

Having determined that the "contrary to public policy" language in § 301.144.2 is unconstitutional, we turn to the district court's denial of an injunction that would require the DOR to issue Ms. Lewis the "ARYAN-1" plate. Although the district court determined that the DOR could not refuse to grant the plate on the ground that it was "contrary to public policy," *Lewis*, 89 F. Supp. 2d at 1091, the court pointed out that that was not the only ground upon which the DOR might deny a plate under § 301.144.2, *see id.* Because the DOR "might still have constitutionally permissible grounds for denying or revoking [Ms. Lewis's] vanity plate," *id.*, the district court refused to grant the injunction. *See id.*

As we have said, the district court correctly determined that the DOR failed in this litigation to advance any constitutional justification for failing to renew Ms. Lewis's plate. This should conclude the inquiry, for "[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions," *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000). Ms. Lewis is not required to prove the absence of a constitutional basis for the DOR's action; she is simply required to make the initial showing that her speech has been restricted. Once Ms. Lewis made that showing, the burden fell on the DOR to advance a constitutional justification for its action, which it has failed to do.

The DOR contends that even if the "contrary to public policy" language is unconstitutional, it must nevertheless reject Ms. Lewis's plate because § 301.144.2 also declares that "[n]o personalized license plates shall be issued ... which are ... inflammatory." Even if we were to agree with the DOR that it may now assert a ground on which to deny Ms. Lewis's plate different from the one that it cited in its letter to Ms. Lewis, we would reject this ground as well. Our conclusion in part II of this opinion, holding that to deny Ms. Lewis her plate to

prevent road rage was unconstitutional, applies with equal force to a denial of the plate because it is "inflammatory." The DOR may not censor a license plate because its message might make people angry. This provision therefore may not constitutionally be applied to the facts of this case.

Because the DOR has not shown that its denial of the "ARYAN-1" plate was constitutional, the district court abused its discretion by refusing to grant an injunction requiring the DOR to issue the plate. We therefore remand the case to the district court for the issuance of such an injunction. Because Ms. Lewis is entitled to an injunction, furthermore, she is a "prevailing party" entitled to attorney's fees pursuant to 42 U.S.C. § 1988(b).

IV.

For the foregoing reasons, we affirm the judgment of the district court in part and reverse it in part, and remand the case for further proceedings not inconsistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-2149/00-2181

Mary E. Lewis,	*	
	*	
Appellant/Cross-Appellee,	*	Order Denying Petition
vs.	*	for Rehearing and for
	*	Rehearing En Banc
Quentin Wilson, in his official capacity as Director of Revenue of the State of Missouri,	*	
	*	
Appellee/Cross-Appellant.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

July 30, 2001

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

MARY E. LEWIS,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 4:98-CV-01610SNL
	)	
QUENTIN WILSON, In his official capacity as DIRECTOR OF REVENUE OF THE State of Missouri	)	
	)	
Respondent.	)	

STATEMENT OF UNCONTROVERTED FACTS

The uncontroverted facts of this case are as follows:

1. All vehicles owned and operated in the State of Missouri must be registered with the Missouri Department of Revenue (DOR). Each vehicle owner must obtain a certificate of ownership by paying the State sales tax. To legally operate a vehicle on the roads in the State of Missouri the owner must obtain a valid Missouri license plate and attach it to the vehicle. See Exhibit C, Affdavit of Teresa Tellman ¶ 4-6.

2. On an annual basis, vehicle owners must renew their license plates with the DOR. To renew a license plate for the next year an owner must show proof of financial responsibility along with an emission/safety inspection certificate and proof of insurance to the DOR. Once these items are presented, the license plate is renewed for the next year. See Exhibit C, Affdavit of Teresa Tellman ¶ 4-6

3. The purpose of a license plate is to ensure that the proper taxes are paid, to provide identification for vehicles on the road and to raise revenue for the State. A personalized (vanity) license plate serves the same purpose as the regularly

issued license plate. See Exhibit C, Affdavit of Teresa Tellman ¶ 4-6.

4. The standard Missouri license plate is a green, white and blue plate with a configuration of six characters, three numbers and three letters with a space in between the first three and last three characters. See Exhibit C, Affidavit of Teresa Tellman ¶ 7.

5. Numbers and letters are configured and assigned to each particular vehicle. No standard license plate will be issued with the numbers "666." See Exhibit C, Affidavit of Teresa Tellman ¶ 7-8.

6. The State imprimatur of "Show-Me State" appears on each license plate just below the number and letter configuration. See Exhibit C, Affidavit of Teresa Tellman ¶ 9.

7. In 1979 the Missouri State Legislature enacted RSMo.§301.144, which created the personalized (vanity) license plate program in the State of Missouri. See Exhibit C, Affidavit of Teresa Tellman ¶ 10.

8. Under the vanity plate program, individuals are permitted to choose for themselves, within the six character limit, the letter and number configuration on their license plate. Individuals must pay an initial $150.00 fee to obtain a vanity plate and a $15.00 fee each year to renew their vanity plate. See Exhibit C, Affidavit of Teresa Tellman ¶ 10-11.

9. According to statute and regulation, a person can have any persoanlized configuration that they want as long as another person does not already have that particular configuration or the configuration is not deemed by DOR to be obscene, profane, inflammatory or contrary to public policy. See Exhibit C, Affidavit of Teresa Tellman ¶ 10-24.

10. To obtain a vanity license plate in the State of Missouri, an individual must fill out a special application and detail the configuration that the person would like for the plate. The individual must then submit this application to the DOR with a fee of $15.00. See Exhibit C, Affidavit of Teresa Tellman ¶ 10-24.

11. The vanity plate program generates roughly $2-3 million a year in revenue for the State of Missouri. See Exhibit C, Affidavit of Teresa Tellman ¶ 11.

12. Once the application is received at the DOR, it is reviewed by a clerk to determine if the requested configuration is already taken or is on a list of impermissible configurations that have been denied in the past. The clerk will also make a basic check to determine if the plate is clearly and without question, obscene, profane, inflammatory or contrary to public policy. If the configuration is rejected for any of these reasons, the clerk will then review any other configurations that the applicant has submitted. If no other configurations have been submitted, then the application is returned along with the fee to the applicant with a letter explaining the reasons for denial. If other configurations appear on the application they will be review in the same manner. See Exhibit C, Affidavit of Teresa Tellman ¶ 10-24.

13. If an applicants' requested configuration meets the basic requirements and is approved by the clerk it will be placed on a list and forwarded to a review committee. See Exhibit C, Affidavit of Teresa Tellman ¶ 10-24.

14. The review committee consists of Administrators of three bureaus within the Department of Revenue. The three bureaus include the Motor Vehicle Bureau, the Field Services Bureau and the Alternative Funds Bureau. See Exhibit C, Affidavit of Teresa Tellman ¶ 10-24.

15. Each member of this committee will review this list of configurations, make comments and pass the list along to the next committee member. If the committee believes that a configuration is obscene, profane, inflammatory or contrary to public policy, it will deny the requested configuration and the applicant will be informed. If the applicant has made a second choice on the application, then that choice will then be placed through the same review as any other plate. If there is no second choice then the application and fee are returned to the applicant with a letter explaining the DOR's position. See Exhibit C, Affidavit of Teresa Tellman ¶ 10-24.

16. If the review committee believes that the requested configuration is not obscence, profane, inflammatory or contrary to public policy, the plate will be manufactured and issued to the applicant. See Exhibit C, Affidavit of Teresa Tellman ¶ 10-24.

17. If the committee believes that the requested configuration is particularly problematic, the Director of the Department of Revenue may review the application with the Motor Vehicle Policy Group and make a determination of whether or not a plate should be issued with the requested configuration. See Exhibit C, Affidavit of Teresa Tellman ¶ 10-24.

18. If, after review with the Motor Vehicle Policy Group, the Director believes that the requested configuration is not obscene, profane, inflammatory or contrary to public policy and should be issued, a vanity plate bearing that configuration will be created and sent to the applicant. If, after review, the Director believes that the configuration should not be issued, the application will be denied. See Exhibit C, Affidavit of Teresa Tellman ¶ 10-24.

19. From time to time the DOR receives complaints regarding particular vanity plates that have been issued. When complaints are received, the complaint and the plate configuration are reviewed by the General Counsel of the DOR. The General Counsel will then make a decision as to to whether or not the plate should be recalled because it violates the statute as being obscene, profane, inflammatory or contrary to public policy. See Exhibit C, Affidavit of Teresa Tellman ¶ 10-24.

20. If the General Counsel believes that the vanity plate should be recalled, a letter is issued informing the vanity plate holder that the plate is being recalled. At that time the plate holder is also informed that they have the right to appeal the decision of the DOR to the Administrative Hearing Commission (AHC). If the person turns in the plate then the issue is resolved. If the person appeals to the AHC, a hearing is held on the issue and the AHC will issue a decision either affirming or overturning the DOR's decision. See Exhibit C, Affidavit of Teresa Tellman ¶ 10-24.

21. If the General Counsel believes that the complaint and the configuration are problematic, he may refer the matter to the Director for review with the Motor Vehile Policy Group. See Exhibit C, Affidavit of Teresa Tellman ¶ 10-24.

22. The Motor Vehicle Policy Group consists of people from various groups both inside and outside of DOR, including a representative from the Missouri Highway Patrol. The purpose of the Motor Vehicle Policy Group is to give the Director advice from a wide variety of sources so that the Director can have an idea of the impact of DOR decisions in various areas ranging from legal advice to public safety. See Exhibit C, Affidavit of Teresa Tellman ¶ 10-24.

23. Many time the decisions of the DOR affect the cars on the roads of the State. To advise the Director of DOR as to how DOR's decisions will affect the cars on the roads and highways of the State, a member of the Missouri Highway Patrol is a regular member and part of the Motor Vehicle Policy Group. See Exhibit B, Affidavit of Janette Lohman ¶ 5-7.

24 There are 155,000 issued vanity plates in the State of Missouri. See Exhibit C, Affidavit of Teresa Tellman ¶ 11.

25. Since the inception of the vanity plate program in 1979, the DOR has developed a list of 70,000 configurations that will not be issued. See Exhibit C, Affidavit of Teresa Tellman ¶ 11.

26. In 1983 Mary Lewis, at that time her last name was Carr, filed an application with DOR to obtain for herself a vanity license plate with the configuration of "ARYAN-1." See Exhibit C, Affidavit of Teresa Tellman ¶ 26-31.

27. The DOR denied Mary Lewis' request for the "ARYAN-1" plate because they believed that this plate was not permitted by RSMo.§301.143 because if was contrary to public policy. See Exhibit C, Affidavit of Teresa Tellman ¶ 26-31.

28. Mary Lewis appealed the denial of the "ARYAN-1" plate to the Administrative Hearing Commission (AHC). The AHC upheld DOR's denial of this plate. See Exhibit C, Affidavit of Teresa Tellman ¶ 26-27.

29. Mary Lewis appealed the AHC decision to the Missouri Court of Appeals. See Exhibit C, Affidavit of Teresa Tellman ¶ 26-27.

30. In the case of Carr v. Director of Revenue, 799 S.W.2d 124 (Mo.App. 1990), the Court of Appeals held that the RSMo.§301.143, at that time, did not grant the DOR the authority to deny her the plate on the grounds that it is contrary to public policy. See Exhibit C, Affidavit of Teresa Tellman ¶ 27.

31. Based upon the decision of the Missouri Court of Appeals, DOR issued Mary Lewis the "ARYAN-1" vanity plate. See Exhibit C, Affidavit of Teresa Tellman ¶ 27.

32. In 1992 the Missouri State Legislature amended RSMo.§301.144 to grant the DOR the authority the deny a vanity plate configuration if DOR believes it to be contrary to public policy. See Exhibit C, Affidavit of Teresa Tellman ¶ 28.

33. In 1997, DOR received a complaint letter from a person who had seen the "ARYAN-1" plate on Mary Lewis' car and expressed that the complainant was offended by the plate and that it was issued by the State of Missouri. See Exhibit C, Affidavit of Teresa Tellman ¶ 29.

34. On June 3, 1997, Jannette Lohman, the Director of the Department at that time, reviewed the "ARYAN-1" license plate with the members of The Motor Vehicle Policy Group and considered whether or not the plate should be renewed. See Exhibit B and C, Affidavits and Janette Lohman ¶ 7-8 and of Teresa Tellman ¶ 31.

35. At the June 3, 1997 meeting, the Director was concerned that because of the inflamatory nature of this configuration it could pose a problem for public safety. See Exhibit B, Affidavit of Janette Lohman ¶ 8-11.

36. It was the Directors' opinion that this plate could lead to distractions on the highway that could lead to accident and injury. See Exhibit B, affidavit of Janette Lohman ¶ 8-11.

37. Furthermore, the Director was concerned that the holder of the plate or the car itself could be subjected to possible retribution. See Exhibit B, affidavit of Janette Lohman ¶ 8-11.

39. In the past the Director had dealt with other configurations that had created a concern for public safety. See Exhibit B, Affidavit of Janette Lohman ¶ .

40. At one time, the numbers of "666" were assigned to a standard plate. See Exhibit B, affidavit of Janette Lohman ¶ 9.

41. Some people believe that "666" is the sign of the devil. See Exhibit B, affidavit Janette Lohman ¶ 9.

42. At least one person with the "666" plate returned it to the DOR because that person's car had eggs thrown on it. See Exhibit B, affidavit of Janette Lohman ¶ 9.

43. As a result of this incident, the Director of DOR determined that no license plate would be issued with the three repeating numbers of "666." See Exhibit C and B, Affidavits of Teresa Tellman ¶ 8 and Janette Lohman ¶ 9 and exhibit E at Pg 42-43.

44. It is the opinion of the Missouri Highway Patrol that if the "ARYAN-1" plate were permitted to remain on the roads of the State of Missouri that it would be a distraction to drivers of other vehicles and that this distraction will lead to more accidents and possible injury and deaths. See Exhibit D, Affidavit of Capatain Billy Nelson ¶ 6-12.

45. It is the opinion of the Missouri Highway Patrol that it would be dangerous to have a plate that provoked drivers to take their attention from the road to make a hand gesture or other signal of support or opposition to a vanity plate. See Exhibit D, Affidavit of Capatain Billy Nelson ¶ 6-12.

46. There is currently a problem of aggressive driving in the State of Missouri that is referred to as "road rage." This type of driving leads to death and injury each year in the State

of Missouri. See Exhibit D, Affidavit of Capatain Billy Nelson ¶ 10.

47. It is also the opinion of the Missouri Highway Patrol that it would be dangerous for someone to avert their attention from the road for a period of time to look at a hand gesture or other signal to determine if it was in support or opposition to a vanity plate. See Exhibit D, Affidavits of Capatain Billy Nelson ¶ 6-8.

48. It is also the opinion of the Missouri Highway Patrol that this vanity plate could lead to incidents between those individuals that support the "ARYAN-1" message and those that oppose its message. The Missouri Highway Patrol believes that these conflicts could be even more dangerous and possibly deadly when dealing with a message such as "ARYAN-1" on a State issued license plate and moving down the highway with cars and trucks moving at seventy (70) miles per hour or more. See Exhibit D, Affidavits of Capatain Billy Nelson ¶ 6-13.

49. A plate that is inflammatory, provocative and dangerous is contrary to public policy. See Exhibit C, Affidavits of Teresa Tellman ¶ 16.

50. At the June 3, 1997 meeting of the Motor Vehicle Policy Group, during the consideration of the "ARYAN-1" plate, there was a consensus that this plate should not be renewed. There was no dissent from the opinion that it should not be renewed. See Exhibit B and C, Affidavit of Janette Lohman ¶12 and Teresa Tellman ¶ 31-33.

51. The Director of DOR made the decision to deny the renewal of the "ARYAN-1" plate not based upon actual message of the plate but rather the potential consequences of the letters on the plate. See Exhibit B, Affidavit of Janette Lohman ¶ 9-12.

52. At the June 3, 1997 meeting, at the close of the consideration of the "ARYAN-1" plate, Janette Lohman who at that time was the Director of the Department of Revenue made the decision not to renew the "ARYAN-1" plate. See Exhibit B, Affidavit of Janette Lohman ¶ 12 .

53. On June 17, 1999, the DOR issued a letter to Mary Lewis informing her that the renewal of her vanity plate had be denied and that she should turn in her "ARYAN-1" plate for another one. See Exhibit C, Affidavit of Teresa Tellman ¶ 33

54. Mary Lewis drives a sports utility vehicle known as Ford Explorer. See Exhibit G, Depo of Mary Lewis at Pg 9.

55. Mary Lewis puts roughly 30,000 miles per year on her car. See Exhibit G, Depo of Mary Lewis at Pg 9.

56. Mary Lewis drives her car to work and for several trips per year from Gasconade County to visit her daughter in St. Louis. See Exhibit G, Depo of Mary Lewis at Pg 9-10.

57. Mary Lewis has a clean driving record and is not under any restriction that would restrict her from driving her car in any part of the State or into any neighborhood of any ethnic background. See Exhibit G, Depo of Mary Lewis at Pg 8-9.

58. During the period of time that Mary Lewis had the "ARYAN-1" license plate on her car, between ten (10) and twenty (20) times, truckers driving eighteen wheeled vehicles honked their horns, waved their arms and pumped their hands in the air as they drove by. According to Mary Lewis she took her eyes from the road ahead of her to direct her attention to the passing trucks long enough for her to allegedly ascertain the state of mind of the truckers as to whether the pumping was done as a positive or negative expression. See Exhibit G, Depo of Mary Lewis at Pg 21-23.

59. In 1982 Mary Lewis was a member of the National States Rights Party. See Exhibit G, Depo of Mary Lewis at Pg 26.

60. In 1974 Mary Lewis was affiliated with the National Socialist White People's Party. See Exhibit G, Depo of Mary Lewis at Pg 26-27.

61. From 1983 to 1986 Mary Lewis was affiliated with a group known as the New Order Party which is a faction associated with the Klu Klux Klan. She help this group put out

is newsletter. She also attended rallies. See Exhibit G, Depo of Mary Lewis at Pg 29-32.

62. In 1984 Mary Lewis attended meetings of the American Nazi Party. See Exhibit G, Depo of Mary Lewis at Pg 32-33.

Respectfully submitted,
JEREMIAH W. (JAY) NIXON
Attorney General

_____
Erwin O. Switzer, III
E.D. Mo. Reg No. 4513
M. Steven Brown
E.D. Mo. Reg. No. 56939
Assistant Attorneys General
Wainwright State Office Building
111 North Seventh Street, Suite 934
St. Louis, MO 63101
(314) 340-7861
Fax # 340-7891
ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

The undersigned certifies that a true and complete copy of the foregoing was mailed via U.S. mail, first class postage prepaid, this ____ day of _____, 1999:

Robert Herman
11034 S. Brentwood Blvd., Suite 1800
St. Louis, MO 63117

_____

FULL TEXT OF MISSOURI'S PERSONALIZED LICENSE PLATE STATUTE

Personalized license plates, fees--new plates every three years without charge--obscene plates prohibited--amateur radio operators, plates, how marked--repossessed vehicles, placards.

301.144. 1. The director of revenue shall establish and issue special personalized license plates containing letters or numbers or combinations of letters and numbers, not to exceed six characters in length. Any person desiring to obtain a special personalized license plate for any motor vehicle other than a commercial motor vehicle licensed for more than twelve thousand pounds shall apply to the director of revenue on a form provided by the director and shall pay a fee of fifteen dollars in addition to the regular registration fees. The director of revenue shall issue rules and regulations setting the standards and establishing the procedure for application for and issuance of the special personalized license plates and shall provide a deadline each year for the applications. No rule or portion of a rule promulgated under the authority of this section shall become effective unless it has been promulgated pursuant to the provisions of section 536.024, RSMo. No two owners shall be issued identical plates. An owner shall make a new application and pay a new fee each year he desires to obtain or retain special personalized license plates; however, notwithstanding the provisions of subsection 8 of section 301.130 to the contrary, the director shall allow the special personalized license plates to be replaced with new plates every three years without any additional charge, above the fee established in this section, to the renewal applicant. Any person currently in possession of an approved personalized license plate shall have first priority on that particular plate for each of the following years that timely and appropriate application is made.

2. No personalized license plates shall be issued containing any letters, numbers or combination of letters and numbers which are obscene, profane, inflammatory or contrary to public policy. The director may recall any personalized license plates, including those issued prior to August 28, 1992, if he determines that the plates are obscene, profane, inflammatory or contrary to public policy. Where the director recalls such

plates under the provisions of this subsection, he shall reissue personalized license plates to the owner of the motor vehicle for which they were issued at no charge, if the new plates proposed by the owner of the motor vehicle meet the standards established under this section. Nothing contained in this subsection shall be interpreted to prohibit the use of license plates, which are no longer valid for registration purposes, as collector's items or for decorative purposes.

3. The director may also establish categories of specialized personalized license plates from which license plates may be issued. Any such person that desires a special personalized license plate from any such category shall pay the same additional fee and make the same kind of application as that required by subsection 1 of this section, and the director shall issue such plates in the same manner as other special personalized license plates are issued.

4. The director of revenue shall issue to residents of the state of Missouri who hold an unrevoked and unexpired official amateur radio license issued by the Federal Communications Commission, upon application and upon payment of the additional fee specified in subsection 1 of this section, special personalized license plates bearing the official amateur radio call letters assigned by the Federal Communications Commission to the applicant. The application shall be accompanied by an affidavit stating that the applicant has an unrevoked and unexpired amateur radio license issued by the Federal Communications Commission and the official radio call letters assigned by the Federal Communications Commission to the applicant.

5. Notwithstanding any other provision to the contrary, any business listed in subsection 1 of section 301.256** that repossesses motor vehicles or trailers and sells or otherwise disposes of them shall be issued a placard displaying the word "Repossessed", provided such business pays the fees presently required of a manufacturer, distributor, or dealer in subsection 1 of section 301.253. Such placard shall bear a number and shall be in such form as the director of revenue shall determine, and shall be only used for demonstrations when displayed substantially as provided for number plates on the rear of the motor vehicle or trailer.

(L. 1977 H.B. 367, et al. § 2, A.L. 1979 S.B. 12, A.L. 1983 H.B. 149, et al., A.L. 1984 S.B. 505 & 471, A.L. 1989 S.B. 209, A.L. 1992 S.B. 607, A.L. 1993 S.B. 329, A.L. 1995 S.B. 3)

*This section was amended by both S.B. 3 and S.B. 70 during the 1st Regular Session of the 88th General Assembly, 1995. Due to possible conflict, both versions are printed here.

**Section 301.256 was repealed by H.B. 1512, 1988.

Personalized license plates, fees--new plates every three years without charge--obscene plates prohibited--amateur radio operators, plates, how marked--repossessed vehicles, placards.

301.144. 1. The director of revenue shall establish and issue special personalized license plates containing letters or numbers or combinations of letters and numbers. Such license plates shall be made with fully reflective material with a common color scheme and design, shall be clearly visible at night, and shall be aesthetically attractive, as prescribed by section 301.130. Any person desiring to obtain a special personalized license plate for any motor vehicle other than a commercial motor vehicle licensed for more than twelve thousand pounds shall apply to the director of revenue on a form provided by the director and shall pay a fee of fifteen dollars in addition to the regular registration fees. The director of revenue shall issue rules and regulations setting the standards and establishing the procedure for application for and issuance of the special personalized license plates and shall provide a deadline each year for the applications. No rule or regulation promulgated pursuant to this section shall become effective until approved by the joint committee on administrative rules. No two owners shall be issued identical plates. An owner shall make a new application and pay a new fee each year he desires to obtain or retain special personalized license plates; however, notwithstanding the provisions of subsection 8 of section 301.130 to the contrary, the director shall allow the special personalized license plates to be replaced with new plates every three years without any additional charge, above the fee

established in this section, to the renewal applicant. Any person currently in possession of an approved personalized license plate shall have first priority on that particular plate for each of the following years that timely and appropriate application is made.

2. No personalized license plates shall be issued containing any letters, numbers or combination of letters and numbers which are obscene, profane, inflammatory or contrary to public policy. The director may recall any personalized license plates, including those issued prior to August 28, 1992, if he determines that the plates are obscene, profane, inflammatory or contrary to public policy. Where the director recalls such plates under the provisions of this subsection, he shall reissue personalized license plates to the owner of the motor vehicle for which they were issued at no charge, if the new plates proposed by the owner of the motor vehicle meet the standards established under this section. Nothing contained in this subsection shall be interpreted to prohibit the use of license plates, which are no longer valid for registration purposes, as collector's items or for decorative purposes.

3. The director may also establish categories of specialized personalized license plates from which license plates may be issued. Any such person that desires a special personalized license plate from any such category shall pay the same additional fee and make the same kind of application as that required by subsection 1 of this section, and the director shall issue such plates in the same manner as other special personalized license plates are issued.

4. The director of revenue shall issue to residents of the state of Missouri who hold an unrevoked and unexpired official amateur radio license issued by the Federal Communications Commission, upon application and upon payment of the additional fee specified in subsection 1 of this section, special personalized license plates bearing the official amateur radio call letters assigned by the Federal Communications Commission to the applicant. The application shall be accompanied by an affidavit stating that the applicant has an unrevoked and unexpired amateur radio license issued by the Federal Communications Commission and the official radio

call letters assigned by the Federal Communications Commission to the applicant.

5. Notwithstanding any other provision to the contrary, any business listed in subsection 1 of section 301.570 that repossesses motor vehicles or trailers and sells or otherwise disposes of them shall be issued a placard displaying the word "Repossessed", provided such business pays the fees presently required of a manufacturer, distributor, or dealer in section 301.560. Such placard shall bear a number and shall be in such form as the director of revenue shall determine, and shall be only used for demonstrations when displayed substantially as provided for number plates on the rear of the motor vehicle or trailer.

(L. 1977 H.B. 367, et al. § 2, A.L. 1979 S.B. 12, A.L. 1983 H.B. 149, et al., A.L. 1984 S.B. 505 & 471, A.L. 1989 S.B. 209, A.L. 1992 S.B. 607, A.L. 1993 S.B. 329, A.L. 1995 S.B. 70)

Effective 1-1-97

*This section was amended by both S.B. 3 and S.B. 70 during the 1st Regular Session of the 88th General Assembly, 1995. Due to possible conflict, both versions are printed here.

SYNOPSES OF PERSONALIZED LICENSE PLATE STATUTES OF THE FIFTY STATES

Alabama: "[N]o license plate [shall] be manufactured and issued which contains objectionable **language or symbols which are considered by the Department of Revenue to be offensive to the peace and dignity** of the State of Alabama." Dept. of Revenue Reg. 810-5-1-.202 (adopted 1982). (Ala. Code § 32-6-151 (2001) authorizes Dept. of Revenue to issue special plate regulations.)

Alaska: "The department will not issue personalized registration plates displaying symbols in a combination which **demeans any ethnic racial group**, carries a prurient meaning, or which is otherwise vulgar or indecent; any combination known by the department to be **patently offensive to a person of ordinary sensibilities** will be considered vulgar or indecent or carrying a prurient meaning; any combination known by the department to be patently offensive to any racial or ethnic group will be considered demeaning to that group." Alaska Admin. Code tit. 13 §, 70.170(b)(8) (2001).

Arizona: "The department may refuse to issue or may suspend, cancel or revoke any combination of letters or numbers or any combination of letters and numbers that carries connotations that are **offensive to good taste and decency**, any combination that is misleading or any combination that duplicates other plates." Ariz. Rev. Stat. § 28-2406(A), 28-2411(B) (2000).

Arkansas: "The director, **in his discretion**, may limit the number of characters or the context in which they appear on the license plate." Ark. - Code Ann. § 27-14-1009(a)(3)(B) (2001).

California: "The department may cancel and order the return of any environmental license plate heretofore or hereafter issued, containing any combination of letters, or numbers, or both, which the department determines carries connotations **offensive to good taste and decency** or which would be misleading." Cal. Veh. Code. § 5105 (Bancroft-Whitney 2001).

Colorado: ". . .[T]he department may refuse to issue any combination of letters or numbers, or both, which may carry

connotations **offensive to good taste and decency** or which would be misleading or a duplication of the regular license plates provided for in this article." Colo. Rev. Stat. § 42-3-114 (2000).

Connecticut: "A fee of sixty-five dollars shall be charged in addition to the regular fee prescribed for the registration of a motor vehicle, including but not limited to any passenger motor vehicle or motorcycle, in accordance with this section for a number plate or plates for such vehicle bearing any combination of letters or numbers requested by the registrant and which **may be issued in the discretion of the commissioner**, except in any case in which the number plates bear the official call letters of an amateur radio station." Conn. Gen. Stat. § 14-49(s) (2001).

Delaware: "**In its discretion**, the Department may refuse any combination of letters, or letters and numerals." Del. Code. Ann. tit. 21 § 2121(h)(1) and (I)(1) (2000).

Florida: "The department is authorized to reject requests **deemed by it to be objectionable** ...." Fla. Stat. § 320.0805 (2000).

Georgia: "The Motor Vehicle Division shall not issue a special prestige license plate which is considered to be obscene according to current community standards, nor shall they issue a special prestige license plate which **defames a religious belief or being, race or ethnic group**. Special prestige license plates will not be issued using profanity. The Motor Vehicle Division shall recall any special prestige license plate which may be determined to be obscene, profane or **defamatory of a religious belief or being, race or ethnic group.**" Ga. Comp. R. & Regs. r. 560-10-22-.02 (2000).

Hawaii: "The director of finance shall not issue special number plates which have the letter and numeral combination of regular plates, are misleading or **publicly objectionable.**" Haw. Rev. Stat. Ann. § 249-9.1 (2000).

Idaho: "Acceptability of the personalized license plate message and issuance, denial or cancellation will be determined by the

Department based on the following criteria: The message in any language, may not carry a sexual connotation nor consist of a term that is considered to be one of: obscenity; contempt, prejudice; **hostility; insult; racial degradation; ethnical degradation;** profanity; or vulgarity as defined in dictionaries of general use, including Webster's Unabridged Dictionary and the Harper & Row New Dictionary of American Slang. The criteria in Subsection 202.08(b) above is **not to be considered an exhaustive list.** A compilation of offensive or obscene words, terms, or letter/number combinations gathered from the experience of Idaho and other states may also be used as a guide." Idaho Code. § 39.02.60.202 (2000).

Illinois: "The Secretary of State shall refuse to issue any license plates bearing a combination of letters or numbers, or both, which creates a potential duplication or, in the opinion of the Secretary, (1) would substantially interfere with plate identification for law enforcement purposes, (2) is misleading, or (3) creates a connotation that is **offensive to good taste and decency.**" 625 Ill. Comp. Stat. 5/3-405.2 (2001).

Indiana: "The bureau may refuse to issue a combination of letters or numerals, or both, that ... [c]arries a connotation **offensive to good taste and decency.**" Ind. Code Ann. § 9-18-15-4(b)(1) (2000).

Iowa: "No combination of characters shall be issued which is sexual in connation; defined in dictionaries as a term of vulgarity, contempt, prejudice, hostility, insult, or **racial or ethnic degradation;** recognized as a swear word; considered to be **offensive;** or a foreign word falling into any of these categories." 761 Iowa Admin. Code r. 761-401.6(2)d (2001).

Kansas: "Unless the letters or numbers designated by the applicant have a **profane, vulgar, lewd or indecent** meaning or connotation, as determined by the director of vehicles, the division shall assign such letters or numbers to the applicant's vehicle, and the letters or numbers, or combination thereof, so assigned shall be deemed the registration number of such vehicle." Kan. Stat. Ann. § 8-132(c) (1999).

Kentucky: "A personalized plate shall not be issued if, **in the discretion of the cabinet**, it carries a letter or number combinations that carry connotations **offensive to good taste and decency.**" Ky. Rev. Stat. Ann. § 186.174(2) (2001).

Louisiana: "The commissioner shall not issue a letter combination which might carry a connotation **offensive to good taste and decency**." La. Rev. Stat. § 463.2(A) (2000).

Maine: "The Secretary of State may issue registration plates that contain letters or a combination of letters and numbers for automobiles, taxi cabs, limousines, pickup trucks, trucks that are registered up to 9,000 pounds gross vehicle weight, motorcycles, motor homes or semitrailers that do not exceed 2,000 pounds and camp trailers." Me. Rev. Stat. Ann. tit. 29-A § 453(1) (2000). "Additionally, the Attorney General's Office has established a policy for vanity plates. "The Secretary of State, in **his or her discretion**, may cancel, refuse to issue, or refuse to reissue a configuration of letters, numbers, or characters (including foreign words) that a reasonable person would believe is in whole or in part: **offensive; inappropriate;** misleading; or duplicative." Vanity Plate Policy 1(A)-(D) (1991).

Maryland: "**In its discretion**, the Administration may refuse any combination of letters and numerals." MD. CODE ANN., TRANSP. I § 13-613(c)(2) (2001). Additionally, the Code of Maryland Regulations notes that personalized plates may be issued, cancelled or recalled at the sole discretion of the Administrator. Md. Regs. Code tit. 11, § 11.15.07.01(C) (2001).

Massachusetts: "The registrar may determine such standards and qualifications for the issuance of said plates **as he deems proper.** Mass. Ann. Laws ch. 92 § 2, seventh paragraph (2001).

Michigan: "**The secretary of state shall not issue a letter combination which might carry a connotation offensive to good taste and decency.**" Mich. Stat. Ann. § 9.2503(2) Sec. 803b.(1) (2000).

Minnesota: "No word or combination of letters placed on personalized license plates may be used for commercial advertising, be of an obscene, indecent, or immoral nature, or be of a nature that would **offend public morals or decency**." Minn. Stat. § 168.12 subd.2a(a) (2000).

Mississippi: "No combination of letters or numbers which comprise words or expressions that are considered obscene, slandering, insulting or vulgar in ordinary usage shall be permitted, **with the Chairman of the State Tax Commission having the responsibility of making such determination**. If, however, such license plate is issued in error or otherwise and is determined by the chairman to be obscene, slanderous, insulting, vulgar or **offensive**, the chairman shall notify such owner that the license plate must be surrendered and that another personalized license plate may be selected by him and issued at no cost." Miss. Code Ann. § 27-19-48(1) (2001).

Missouri: "No personalized license plates shall be issued containing any letters, numbers or combination of letters and numbers which are obscene, profane, inflammatory or contrary to public policy." Mo. Rev. Stat. § 301.144.2 (2000).

Montana: ". . .[T]he department may refuse to issue any combination of letters or numbers, or both, that may carry connotations **offensive to good taste and decency** or which are misleading or a duplication of license plates provided for elsewhere in this title." Mont. Code Ann. § 61-3-405 (2000).

Nebraska: "The characters in the order used shall not express, connote, or imply any obscene or **objectionable** words or abbreviations." Neb. Rev. Stat. Ann. § 60-311.11(2)(e) (Lexis L. Publg. 2001).

Nevada: "No combination of letters, numbers or spaces is allowed if it ... [e]xpresses contempt, ridicule or superiority of: (1) Race; (2) Ethnic heritage; (3) Religion; (4) Gender; or (5) Political affiliation, [or] [c]ontains any connotation that is sexual, vulgar, **derogatory**, profane or obscene, [or] [m]akes a **defamatory reference to a person or group**. Is determined by the department to be inappropriate." Nev. Admin. Code Ch. 482, § 482.321(6)(b)-(f) (2001).

New Hampshire: "A vanity registration decal/plate shall: not have any appeal to a prurient interest, or be capable of an obscene interpretation; not be morally, ethnically, racially, or in any other manner **offensive to good taste.**" N.H. Code Admin. R. Ann. Saf-C 512.61(c)(2)-(3) (2001).

New Jersey: "The following registration numbers shall be excluded from issuance as "particular identifying marks" and, where so indicated, shall be used for the purpose specified: any combination of alphabetic characters or numbers, or both, that may carry connotations **offensive to good taste and decency.**" N.J. Admin. Code 13:20-34.3(a)(35) (2001).

New Mexico: "No prestige plate will be established or approved for issuance which displays a set that: the division finds to be **derogatory** or obscene." N.M. Admin. Code tit. 18 § 18.19.3.62(B)(2) (2001).

New York: "No plate shall be issued under this Part which is, in the discretion of the commissioner, obscene, lewd, lascivious, **derogatory to a particular ethnic or other group, or patently offensive.**" 15 New York Comp. Codes R. & Regs. 16.5(e) (2001).

North Carolina: "The Division may refuse to issue a plate with a letter combination that is **offensive to good taste and decency.**" N.C. Gen. Stat. § 20-79.4(b)(32) (2000).

North Dakota: "The department may, **in its discretion,** provide special license plates." N.D. Cent. Code § 39-04-1-.3 (2000).

Ohio: "The registrar of motor vehicles shall be allowed a fee of not to exceed thirty-five dollars, which shall be in addition to the regular license fee for tags as prescribed under section 4503.04 of the Revised Code and any tax levied under section 4504.02 or 4504.06 of the Revised Code, for each application received by the registrar for special reserved license plate numbers containing more than three letters or numerals, and the issuing of such licenses and validation stickers in the several series **as the registrar may designate.**" Ohio Rev. Code Ann. § 4503.42 (Anderson 2001).

Oklahoma: ". . .[N]o special plate will be issued which may be **offensive to the general public.**" Okla. Admin. Code § 710:60-3-150(d) (adopted 1994).

Oregon: "DMV shall not approve a custom plate choice, including plate choices that would do so by means of foreign or slang words or phrases, by use of phonetic, numeric or reverse spelling, or by being viewed in a mirror image, that: (a) would have the effect of alarming, threatening, offending or misleading a reasonable person. Such choice may include, but are not limited to, combinations of letters, numbers or both that: (A) refer to intimate bodily parts or to sexual or excretory acts or functions; (B) refer in alarming or **offensive manner to a person or class of persons on the basis or race, color, gender, ethnic heritage, national origin, or other characteristic;** (C) suggest that the vehicle to which the custom plate is issued is an official vehicle of a public agency or official, when it is in fact not such a vehicle; and/or (D) refer to illegal acts. Refers to alcoholic beverages, or controlled substances or paraphernalia used in the consumption thereof by combinations of letters, numbers or both." Or. Admin. R. 735-046-0010(7)(a)-(b) (2000).

Pennsylvania: "Personal registration plates shall conform with the following: a personal registration plate may not contain a combination of letters or numbers, or both, which, in the judgment of the Department, has connotations **offensive to good taste and decency** or would be misleading." Pa. Code tit. § 49.3 (2001).

Rhode Island: ". . .[T]he administrator shall in his or her discretion refuse to issue any letter or combination of letters and numbers which might carry connotations offensive to **good taste and decency.**" R.I. Gen. Laws § 31-3-17.1 (2001).

South Carolina: "The department, in its discretion, may refuse the issue of letter combinations which may carry connotations **offensive to good taste and decency** and may not assign to a person not holding the relevant office letters or numerals denoting the holder to have a public office." S.C. Code Ann. § 56-3-2010(A) (2000).

South Dakota: "The secretary may refuse to issue any letter combination which carries connotations **offensive to good taste and decency.**" S.D. Codified Laws 32-5-89.2 (2001).

Tennessee: "The commissioner of safety shall not issue any license plate commemorating any practice which is **contrary to the public policy of the State of Tennessee,** nor shall the commissioner issue any license plate to any entity whose goals and objectives are contrary to the public policy of Tennessee. The commissioner shall refuse to issue any combination of letters, numbers or positions that may carry connotations **offensive to good taste and decency** or that are misleading." Tenn. Code Ann. § 55-4-210(d)(1)-(2) (2001).

Texas: "A personalized license plate number will not be approved if the number is determined to be **obscene or objectionable** by the director." 43 Tex. Transp. Admin. Code § 17.28(c)(8)(C)(ii) (2001).

Utah: "The division may refuse to issue any combination of letters, numbers, or both that may carry connotations **offensive to good taste and decency** or that would be misleading." Utah Code Ann. § 41-1a-411(2) (2000).

Vermont: "The primary purpose of motor vehicle registration plates is to identify motor vehicles. The special plate is a nonpublic forum. Nothing in the issuance of a special plate creates a designated or limited public forum. All new applications for special plates will be carefully reviewed and will be issued only when it has been established within reasonable means that the requested number or letters and/or combination of letters, numerals, and spaces do not read, suggest, or cannot be construed to read, or suggest anything that **might be offensive** or confusing to the general public. Code Vt. R. 14-050-025(f)(1)-(7) (2001).

Virginia: "The Commissioner may, **in his discretion,** reserve license plates with certain registration numbers or letters or combinations thereof for issuance to persons requesting license plates so numbered and lettered." Va. Code Ann. § 46.2-726 (2000).

Washington: " . . .[T]he department may refuse to issue any combination of letters or numbers, or both, that may carry connotations **offensive to good taste and decency** or which would be misleading or a duplication of license plates provided for in chapter 46.16 RCW." Wash. Rev. Code Ann. § 46.16.580 (West 2001).

West Virginia: "A personalized plate will be issued if the Division of motor Vehicles determines: the requested choice is not obscene or **possibly offensive**." W. Va. Code § 17a-2-10A(e) (2001).

Wisconsin: "The department may refuse to issue any combination of letters or numbers, or both, which may carry connotations **offensive to good taste or decency**, or which would be misleading, or in conflict with the issuance of any other registration plates. Wis. Stat. § 341.145 (2000).

Wyoming: "Any combination that spells, connotes, abbreviates, or otherwise stands for obscene, vulgar, **indecent**, or pruriently suggestive language shall not be allowed." Weil's Code Wyo. R. 045-030-004 § 4(b) (2000).

Supreme Court U.S.
FILED
MAR 4 2002
OFFICE OF THE CLERK

(3)
No. 01-802

In The

Supreme Court of the United States

CAROL R. FISCHER, DIRECTOR OF REVENUE OF MISSOURI,

Petitioner,

v.

MARY E. LEWIS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

SCHWARTZ, HERMAN & DAVIDSON
ROBERT HERMAN

Attorney of Record for Respondent
Cooperating Counsel for American Civil Liberties Union for the Eastern District of Missouri

621 North Skinker
St. Louis, Missouri 63130
(314) 862-0200
(314) 862-3050 (fax)

bsp

QUESTIONS PRESENTED

1. Whether the First Amendment permits Missouri to deny a personalized license plate because the viewpoint of its message is thought to be inflammatory or contrary to public policy.

2. Whether the First Amendment permits Missouri to deny a personalized license plate because the viewpoint of its message is thought likely to provoke hostile reactions by viewers.

3. Whether Missouri's personalized license plate statute that delegates standardless discretion to determine acceptability of license plate messages on the basis of viewpoint is facially valid under the First Amendment.

TABLE OF CONTENTS

Statement of the Case.....1
Reasons why the Writ should not be granted.....3
Reason 1.....4
Reason 2.....5
Reason 3.....7
Conclusion.....8

TABLE OF AUTHORITIES

CASES

Bachellar v. Maryland, 397 U.S. 564, 90 S.Ct. 1312, 25 L.Ed.2d 570 (1970).....4
Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983).....4
Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).....6
Brown v. Louisiana, 383 U.S. 131, 86 S.Ct. 719 (1966).....4
Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).....4
Carey v. Brown, 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980).....4
City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984).....4
City of Lakewood v. Plain Dealer Pub. Co. 486 U.S. 750, 108 S.Ct. 2138, (U.S.Ohio, 1988).....6
Colorado Republican Federal Campaign Committee v. Federal Election Com'n, 518 U.S. 604, 116 S.Ct. 2309 (U.S.Colo. 1996).....5
Cox v. Louisiana, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965).....6
Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 112 S.Ct. 2395 (U.S.Ga.,1992).....7
Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985).....5, 7
FCC v. Pacifica Foundation, 438 U.S 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978).....4
Gooding v. Wilson, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972).....7
Grayned v. Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).....4
Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 108 S.Ct., at 881-882.....4, 7
Kunz v. New York, 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280 (1951).....6

Los Angeles Police Dept. v. United Reporting Publishing Corp., 528 U.S. 32 (1999).....5
Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938).....6
Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943).....7
National Endowment for the Arts v. Finley 524 U.S. 569, 118 S.Ct. 2168 (U.S. Cal.,1998).....5
Police Dept. of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972).....4
R.A.V. v. City of St. Paul, Minn, 505 U.S. 377, 393, 112 S.Ct. 2538, 2549 (U.S.Minn. 1992).....7
Renne v. Geary, et.al, 501 U.S. 312, 111 S.Ct. 2331 (1990).....5
Schneider v. State (Town of Irvington), 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939).....7
Shuttlesworth v. Birmingham, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969).....6
Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931).....4
Terminiello v. Chicago, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949).....7
Texas v. Johnson, 491 U.S. 397, 415, 109 S.Ct. 2533, 2545 (U.S.Tex. 1989).....4
U.S. v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, (U.S.Mass. 1968).....4
United States v. Playboy Entertainment group, Inc., 529 U.S. 803, 816 (2000).....2
Young v. American Mini Theatres, Inc. 427 U.S. 50, 96 S.Ct. 2440, (U.S.Mich. 1976).....4, 6

STATUTES

§301.144.3 R.S.Mo. Supp. 1997.....1

STATEMENT OF THE CASE

Missouri's personalized license plate program permits the license plate holder to communicate a message to the public, subject only to the statutory restriction that "no personalized license plate shall be issued containing any letters, numbers or combination of letters and numbers which are obscene, profane, inflammatory or contrary to public policy." §301.144.3 R.S. Mo. Supp. 1997.

Missouri has issued personalized plates with messages denoting religious orientation, (JESUS, ISLAM5, SHALOM), national origin (IRISH, EUROPN, POLLAK, AGREEK), political beliefs (PEACE, PROCCW, PROLYF, PROLIF, PROUSA), and ethnic or cultural heritage (CELTIC, AFROAM, INDIAN, BLKMAN). See Respondent's Appendix B.

Since 1992, Respondent has displayed a personalized license plate reading "ARYAN-1." During 1997, Missouri officials received an anonymous complaint letter from a person who saw Respondent's plate and was offended. In response to the complaint letter, Missouri's Director of Revenue reviewed the plate with members of the Motor Vehicle Policy Group. The Director testified that she personally found the message conveyed to be offensive because it represents a "viewpoint" or "philosophy that believes in the annihilation of the Jews, African-Americans and other races that aren't Aryan." Respondent's Appendix A. The Motor Vehicle Policy Group agreed with her that the general public would also find the message offensive.

On June 17, 1997, Missouri notified Respondent that it would not renew her license plate because it "conveyed a message that is contrary to public policy." District Court opinion, Respondent's Appendix, A-7. Missouri shifted the focus of its public policy objections to Respondent's plate several times during the litigation. At first, Missouri justified its decision on the grounds that the plate's message was offensive. Later the

focus shifted to a concern for public safety in the prevention of "road rage." A-22. Missouri did not rely on the "obscene, profane or inflammatory" exclusions of the statute.

The District Court invalidated Missouri's action under the "against public policy" prong of the statute, holding that such provision is "an unreasonably vague regulation of a nonpublic forum, which in effect creates standardless discretion in a public official." Petitioner's Appendix. A-13. However, the District Court dismissed Respondent's complaint, holding that Respondent failed to challenge the remaining statutory prongs that were severable, and in the words of the District Court, "the Director might still have constitutionally permissible grounds for denying or revoking [Respondent's] vanity plate." Petitioner's Appendix. A-15.

The Eighth Circuit affirmed the District Court's ruling that the "against public policy" prong of the statute was constitutionally void. The court expressed "some initial skepticism" as to Missouri's characterization of the license plate as a nonpublic forum, but ultimately found it unnecessary to resolve the issue of the precise nature of the forum holding Missouri's statute unconstitutional, whatever kind of forum it might be. A-20.

The Eighth Circuit also reversed the District Court's dismissal of Respondent's complaint, holding that Missouri failed to meet its burden to prove the constitutionality of its interference with speech, and that Respondent was not required to prove the absence of a constitutional basis for Missouri's actions, citing *United States v. Playboy Entertainment group, Inc.*, 529 U.S. 803, 816 (2000). The court further held that even if Missouri had advanced the "inflammatory" prong of the statute, it suffered from the same constitutional defect as the "against public policy" criteria. Petitioner's Appendix. A-25

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. MISSOURI'S STATUTE IS UNCONSTITUTIONAL AS APPLIED AND IT IS UNNECESSARY TO REACH THE QUESTION OF STATUTORY OVERBREADTH, THEREFORE THIS CASE IS NOT AN APPROPRIATE VEHICLE IN WHICH TO DECIDE THE CONTINUING VALIDITY OF THE OVERBREADTH DOCTRINE.

2. NEITHER OF THE ALLEGEDLY CONFLICTING DECISIONS CITED BY PETITIONER INVOKE THE OVERBREADTH DOCTRINE IN THE CONTEXT OF A PRIOR RESTRAINT SPEECH LICENSING REGULATORY SCHEME, AND ARE THUS DISTINUISHABLE AS A MATTER OF BOTH FACT AND LAW.

3. THE EIGHTH CIRCUIT'S REJECTION OF A HECKLER'S VETO FOLLOWS A LONG UNBROKEN LINE OF AUTHORITY WHICH THE EIGHTH CIRCUIT FULLY CONSIDERED AND CORRECTLY APPLIED.

1. MISSOURI'S STATUTE IS UNCONSTITUTIONAL AS APPLIED AND IT IS UNNECESSARY TO REACH THE QUESTION OF STATUTORY OVERBREADTH, THEREFORE THIS CASE IS NOT AN APPROPRIATE VEHICLE IN WHICH TO DECIDE THE CONTINUING VALIDITY OF THE OVERBREADTH DOCTRINE

Missouri admits it rejected Respondent's personalized license plate because the viewpoint of the message expressed therein was offensive. Such admission conclusively demonstrates that Missouri's statute is unconstitutional as applied. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 415, 109 S.Ct. 2533, 2545 (U.S.Tex. 1989); *Hustler Magazine, Inc. v. Falwell*, 485 U.S., at 55-56, 108 S.Ct., at 881-882; *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804, 104 S.Ct. 2118, 2128, 80 L.Ed.2d 772 (1984); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65, 72, 103 S.Ct. 2875, 2879, 2883, 77 L.Ed.2d 469 (1983); *Carey v. Brown*, 447 U.S. 455, 462-463, 100 S.Ct. 2286, 2291, 65 L.Ed.2d 263 (1980); *FCC v. Pacifica Foundation*, 438 U.S., at 745-746, 98 S.Ct., at 3038; *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63-65, 67-68, 96 S.Ct. 2440, 2448-2450, 2450-2451, 49 L.Ed.2d 310 (1976) (plurality opinion); *Buckley v. Valeo*, 424 U.S. 1, 16-17, 96 S.Ct. 612, 633-634, 46 L.Ed.2d 659 (1976); *Grayned v. Rockford*, 408 U.S. 104, 115, 92 S.Ct. 2294, 2302-2303, 33 L.Ed.2d 222 (1972); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 2289, 33 L.Ed.2d 212 (1972); *Bachellar v. Maryland*, 397 U.S. 564, 567, 90 S.Ct. 1312, 1314, 25 L.Ed.2d 570 (1970); *U.S. v. O'Brien*, 391 U.S. 367, 382, 88 S.Ct. 1673, 1681 (U.S.Mass. 1968); *Brown v. Louisiana*, 383 U.S., at 142-143, 86 S.Ct., at 724-725; *Stromberg v. California*, 283 U.S., at 368-369, 51 S.Ct., at 535-536. Whether license plates constitute a public or nonpublic forum is irrelevant because viewpoint discrimination is impermissible in all forums, even

nonpublic ones. *National Endowment for the Arts v. Finley* 524 U.S. 569, 615, 118 S.Ct. 2168, 2192 (U.S. Cal.,1998); *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806, 105 S.Ct. 3439, 3451, 87 L.Ed.2d 567 (1985).

The lower court's decision could have and should have limited their holding to Missouri's unconstitutional application of its statute in the narrow facts of this case. The lower courts' further inquiry into the statute's facial invalidity was and is dicta, unnecessary to the final decision and result in this case. Since the lower courts' analysis of the facial constitutionality of the statute was merely advisory, this case is not an appropriate vehicle for Missouri's challenge to the overbreadth doctrine. A facial challenge generally should not be considered when an "as applied" challenge fully resolves the case. *Colorado Republican Federal Campaign Committee v. Federal Election Com'n*, 518 U.S. 604,624, 116 S.Ct. 2309, 2320 (U.S.Colo. 1996); *Renne v. Geary*, et.al, 501 U.S. 312, 324, 111 S.Ct. 2331, 2340 (1990).

2. NEITHER OF THE ALLEGEDLY CONFLICTING DECISIONS CITED BY PETITIONER INVOKE THE OVERBREADTH DOCTRINE IN THE CONTEXT OF A PRIOR RESTRAINT SPEECH LICENSING REGULATORY SCHEME, AND ARE THUS DISTINUISHABLE AS A MATTER OF BOTH FACT AND LAW.

Neither *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999) (United Reporting) nor *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (Finley), present any conflict with the instant decision. United Reporting involved a facial challenge to a state statute regulating private access to government records and did not abridge any third party's right to engage in speech. Finley was a case concerning government funding of arts organizations, holding that the challenged statutory criteria were merely advisory, and did not interfere with the rights of private

speakers in a public forum. Neither case involved the prior restraint licensing of third party speech.

The instant case is legally and factually distinguishable because it concerns Missouri's exercise of standardless and therefore virtually unlimited discretion to prohibit and punish politically unacceptable speech within a statutory scheme that expressly purports to license acceptable speech.

The most common, and never challenged use of the overbreadth doctrine is within the context of third party speech licensing regulatory schemes, as presented by the instant case, where speech has required prior official approval under laws that delegated standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights. *City of Lakewood v. Plain Dealer Pub. Co.* 486 U.S. 750, 757, 108 S.Ct. 2138, 2144 (U.S.Ohio, 1988); *Young v. American Mini Theatres*, Inc. 427 U.S. 50, 60, 96 S.Ct. 2440, 2447 (U.S.Mich.,1976); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969); *Cox v. Louisiana*, 379 U.S. 536, 553-558, 85 S.Ct. 453, 463-466, 13 L.Ed.2d 471 (1965); *Kunz v. New York*, 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280 (1951); *Lovell v. Griffin*, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938); *Broadrick v. Oklahoma*, 413 U.S. 601. Petitioners can cite no case in which this court, or any other court, has challenged the continued application of the overbreadth doctrine to invalidate such prior restraints of speech by discretionary governmental licensing.

To the extent that the overbreadth doctrine was invoked by the courts below, it was applied in the narrow context for which it was originally created, and in a manner consistent with all prior precedent. It did not establish a "new rule" as Petitioners complain. Nor is there justification for Petitioners' warning of apocalypse to the integrity of other states' insurance codes, employment policies, or prison regulations, which do not relate to prior restraint attempts by the state to regulate speech.

3. THE EIGHTH CIRCUIT'S REJECTION OF A HECKLER'S VETO FOLLOWS A LONG UNBROKEN LINE OF AUTHORITY WHICH THE EIGHTH CIRCUIT FULLY CONSIDERED AND CORRECTLY APPLIED.

This Court's rejection of the heckler's veto has never wavered. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134-135, 112 S.Ct. 2395, 2403-404 (U.S.Ga.,1992); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-56, 108 S.Ct. 876, 881-882, 99 L.Ed.2d 41 (1988); *Murdock v. Pennsylvania*, 319 U.S. 105, 116, 63 S.Ct. 870, 876, 87 L.Ed. 1292 (1943); *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 162, 60 S.Ct. 146, 151, 84 L.Ed. 155 (1939); *Gooding v. Wilson*, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972); *Terminiello v. Chicago*, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949). Petitioners' suggestion that this Court's precedents allow anticipated public reaction to an offensive viewpoint to be used within a statutory scheme of prior restraint, is simply wrong. Petitioners' citation of *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S.788, 811, 105 S.Ct. 3439, 3454 (U.S.Dist.Col. 1985), for the premise that the First Amendment does not prohibit a viewpoint-neutral exclusion in a nonpublic forum is irrelevant to the instant case wherein Petitioners' actions were admitedly viewpoint-motivated.

Petitioner's attempt to avoid the heckler's veto doctrine, contending their regulations are directed solely at the secondary effects of speech. The Eighth Circuit's rejection of Petitioners' contention is consistent with this Court's ruling in *R.A.V. v. City of St. Paul, Minn*, 505 U.S. 377, 393, 112 S.Ct. 2538, 2549 (U.S.Minn. 1992).

Petitioners fail to identify any conflict with any Court ruling, and their petition for certiorari should be denied.

CONCLUSION

For all the foregoing reasons, Petitioner's Petition for Certiorari should be denied.

Respectfully Submitted,

SCHWARTZ, HERMAN & DAVIDSON

Robert Herman FBN #3382
Attorney for Respondent
Cooperating Counsel for American Civil Liberties Union for the Eastern District of Missouri
St. Louis, Missouri 63130
(314) 862-0200
(314) 862-3050 (fax)

RESPONDENT'S APPENDIX A – EXTRACT OF DEPOSITION OF JANETTE LOHMAN MAY 24, 1999 PAGES 31-32

(MR. HERMAN CONTINUING) Is there a reason - - is it the belief by the Department of Revenue and its agents that the proposed license plate that reads A-R-Y-A-N-1 represents an offensive philosophy? Is that the reason that the plate was denied?

A. (LOHMAN) The reason that the plate was denied was because we thought it was going to - - we had already had a complaint about it and it already had offended somebody and we thought it was the kind of plate that could offend the general segment of the community. And based on public policy concerns in terms of public safety the fear is that if you have a license plate that is going - - that could in fact provoke road rage you're going to be endangering the person who has the plate as well as other people who might be hurt if an accident occurred.

Q. Well, it's not obscene in the sense of scatological, correct?

A. What does that mean?

Q. Scatological means four letters (sic) words, the common four letter words or bathroom humor or - - I believe you have a list somewhere of words that are prohibited and I think that's that list over there with reference to body parts.

A. It certainly doesn't reference to body parts.

Q. And the reference that makes it offensive is a reference to philosophy, right?

MR. SWITZER: I'll object to the question, it's been asked and answered.

(MR. HERMAN CONTINUING) I'm just trying to narrow it down so I understand. Is it the reference to an objectionable philosophy the thing that makes this plate violate public policy in your view?

A. The thing that makes it violate public policy in my view is the fact that it does refer, as you suggest, to a

philosophy that believes in the annihilation of the Jews, African-Americans and other races that aren't Aryan.

APPENDIX B – SELECTED LICENSE PLATES DATED FEBRUARY 16, 1999 PRODUCED BY THE MISSOURI DIRECTOR OF REVENUE IN RESPONSE TO RESPONDENT'S MOTION FOR PRODUCTION OF DOCUMENTS AND APPEARING IN RESPONDENT'S INDEX, EIGHTH CIRCUIT BRIEF, EXHIBIT 7

MISSOURI DEPARTMENT OF REVENUE
INFORMATIONS SYSTEM DIVISION
SPECIAL TYPE PLATE FILE SEARCH
ALL PERSONALIZED PLATES IN TABLE FORMAT
(SELECT PLATE TYPES /EXP –YEARS GE 1999)

AFROAM
AGREEK
BLKMAN
CELTIC
EUROPN
JESUS
INDIAN
IRISH
ISLAM5
PEACE
POLLAK
PROCCW
PROLYF
PROLIF
SHALOM

(4)

Supreme Court, U.S.
FILED

No. 01-802

IN THE
Supreme Court of The United States

CAROL R. FISCHER,
DIRECTOR OF REVENUE OF THE STATE OF MISSOURI,
Petitioner,

v.

MARY E. LEWIS,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

JEREMIAH W. (JAY) NIXON
Attorney General
JAMES R. LAYTON
State Solicitor
ERWIN O. SWITZER, III*
Special Chief Counsel
Wainwright State Office Building
111 North 7th Street, Suite 204
St. Louis, Missouri 63101
(314) 340-6816
Counsel for Petitioner,
Carol R. Fischer, Director of Revenue
**Counsel of Record*

14 pp

TABLE OF AUTHORITIES

Cases:

Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989) 6

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 3

City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750 (1988) 3

Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n, 518 U.S. 604 (1996) 5

Cox v. Louisiana, 379 U.S. 536 (1965) 3

Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123 (1992) 8

Gooding v. Wilson, 405 U.S. 518 (1972) 9

Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) 8

Kunz v. New York, 340 U.S. 290 (1951) 3

Los Angeles Police Dept. v. United Reporting Publishing Corp., 528 U.S. 32 (1999) 4, 5

Lovell v. Griffin, 303 U.S. 444 (1938) 3

Murdock v. Pennsylvania, 319 U.S. 105 (1943) 8

National Endowment for the Arts v. Finley,
524 U.S. 569 (1998) 4, 5

R.A.V. v. City of St. Paul, Minn.,
505 U.S. 377 (1992) 9

Renne v. Geary, 501 U.S. 312 (1991) 5, 6

Schneider v. State (Town of Irvington),
308 U.S. 147 (1939) 9

Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) ... 3

Terminiello v. Chicago, 337 U.S. 1 (1949) 9

Young v. American Mini Theatres, Inc.,
427 U.S. 50 (1976) 3

Other:

Laurie D. Medley, Note, *FRESPCH:*
Vanity Plates and the First Amendment,
25 Vt. L. Rev. 879 (2001) 2

IN THE
Supreme Court of The United States

CAROL R. FISCHER,
DIRECTOR OF REVENUE OF THE STATE OF MISSOURI,
Petitioner,

v.

MARY E. LEWIS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

REPLY BRIEF FOR THE PETITIONER

Respondent Lewis concedes that the Eighth Circuit accepted her argument and concluded that the statute was unconstitutional on its face because it did not expressly preclude unconstitutional application. And she concedes that the court of appeals should not have addressed the facial invalidity issue. To nonetheless deprive that portion of the court's decision of sufficient force to compel consideration by this Court, Lewis now calls it "dicta" (Br. Opp. 5). She cites the court of appeals' alternative, "as-applied" basis for overturning the Director of Revenue's action. But in discussing that alternative, the court of appeals said nothing that would exempt future cases from its "facial invalidity" analysis. And Lewis does not and

cannot contest that the analysis goes beyond the case law of this and other courts in a key respect: it eliminates the need for a punishment or a sanction.

Lewis asserts that the court of appeals' analysis on the "as applied" question was the court's only real holding, and argues that the holding was correct for a reason that would not, if true, merit certiorari: that the Department of Revenue admitted that it rejected the ARYAN-1 plate because of distaste for the viewpoint (Br. Opp. at 4, 6-7). Rather than conclude that the plate was rejected for that reason, the court of appeals assumed that the plate was rejected "to prevent the occurrence of road rage" (Cert. Pet. App. A-22). Lewis wants to avoid that assumption because under prior precedent, preventing "road rage" is a legitimate basis for state action in this, a nonpublic forum.

1. Lewis ignores the fundamental point made in the first reason given for granting the petition: that the vagueness and overbreadth doctrines have not previously been applied, and should not be applied, when there is no threat of punishment or sanction.[1] Instead, Lewis cites seven cases involving "speech licensing regulatory schemes" that all involve punishment, and asserts that Missouri's vanity plate program licenses speech like those criminal laws (Br. Opp. 6). But Missouri's vanity license plate program is not a "speech" licensing scheme, at least not in the way that

---

[1] This point was addressed in a recent article in the context of personalized license plates. Laurie D. Medley, Note, *FRESPCH: Vanity Plates and the First Amendment*, 25 Vt. L. Rev. 879, 903-04 (2001).

phrase has been used in prior cases. Missouri licenses motor vehicles, not speech.

The difference between a scheme that licenses speech and one that licenses motor vehicles is not a matter of semantics. The difference is in punishment. A speech licensing scheme is one under which a person can be punished, usually criminally, for speaking or attempting to speak without a license, such as by selling newspapers or by engaging in a public demonstration.[2] Under Missouri's license plate statute, a person can be punished for driving a vehicle without a license, but not for attempts at speech.[3]

---

[2] Lewis cites the following cases: *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988) (licenses for newspaper vending machines); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 60 (1976) (adult movie theater licensing statute upheld); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 89 (1969) (permits required for parades or public demonstrations); *Cox v. Louisiana*, 379 U.S. 536, 553-558 (1965) (peace disturbance statute; no license involved); *Kunz v. New York*, 340 U.S. 290 (1951) (permit for religious meetings); *Lovell v. Griffin*, 303 U.S. 444 (1938) (permit for pamphlet distribution); *Broadrick v. Oklahoma*, 413 U.S. 601(1973) (rejecting challenge to prohibitions on political activity by certain state employees).

[3] Lewis states, without citation or explanation, that Missouri's statute grants the power to "punish" politically unacceptable speech (Br. Opp. 6). But this entirely new argument is contrary to the statute and the uncontroverted record (Cert. Pet. 14).

This case involves the "speech" that is put onto the license plate itself; none of the cases cited by Lewis refer to restrictions on such speech, proposed by a citizen but printed by the State, as "speech licensing."

Rather than being like the cases Lewis cites, this case is most analogous those discussed in the petition, *Los Angeles Police Dept. v. United Reporting Pub. Corp.*, 528 U.S. 32 (1999) (*United Reporting*), and *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (*Finley*). Lewis misses the mark in her effort to divert this case from the course followed in those.

Lewis claims that *Finley* is inapplicable because it involved criteria that were "merely advisory" in funding arts organizations (Br. Opp. 5). The Court did make the point that the criteria were advisory. But Lewis ignores the reason this Court made that point: the "advisory" nature of the criteria was relevant because that fact "undercut respondents' argument that the provision inevitably will be utilized as a tool for invidious viewpoint discrimination." 524 U.S. at 582. The "advisory" qualifier undercut that argument because it made unrealistic the danger of a "chilling" of speech. *Id.*

Here, too, the danger of "chilling" is unrealistic, regardless of whether the criteria are advisory. In fact, Lewis does not even attempt to explain how the Missouri criteria could "chill" private speech in the absence of any possible penalty. The court of appeals' rule, then, goes well beyond the *Finley* analysis by holding invalid a state statute that contains no penalty.

Lewis asserts that *United Reporting* is irrelevant because it dealt with access to government records and not to abridging speech (Br. Opp. 5). That is true, but it does not eliminate the connection between this Court's facial validity analysis and the court of appeals' corresponding analysis. This Court said there was no abridgement of speech "for purposes of facial invalidation" in *United Reporting* because there was no threat of punishment, and because the litigant was free to disseminate information already possessed. 528 U.S. at 40-41. Here, too, there is no threat of punishment or even a monetary sanction (such as the potential funding cutoff in *Finley*). And Lewis remains entirely free to make signs or say "ARYAN." Yet the court of appeals found a constitutional violation.

Thus in the Eighth Circuit, the threat of punishment or sanction is no longer a requirement for a finding that a statute is invalid on its face, so long as the statute does not expressly prevent viewpoint discrimination. Lewis belittles the threat of such a new rule, arguing, curiously, that the Eighth Circuit "should have limited [its] holding to . . . the narrow facts of this case" (Br. Opp. 5). Lewis calls the facial invalidity analysis "dicta," "unnecessary," and "merely advisory" (Br. Opp. 5). But elsewhere in her response, Lewis states that the facial invalidity analysis was part of the court of appeals' holding (Br. Opp. 2).

Consistent with that alternative concession, Lewis suggests that certiorari should be denied because the "as applied" argument could have been dispositive (Br. Opp. 5). She cites two cases for that proposition: *Renne v. Geary*, 501 U.S. 312 (1991); and *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 518

U.S. 604, 624 (1996). But they stand for the proposition that the lower courts should not make a facial invalidity finding unless it is necessary to the outcome. Otherwise, the facial invalidity doctrine would become "a means of mounting gratuitous wholesale attacks upon state and federal laws." *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 484-85 (1989), *quoted in Renne v. Geary*, 501 U.S. at 324. What this Court identified in *Renne* and *Colorado Republican* as an improper course was precisely the one taken by the Eighth Circuit here. That error is a reason to grant, rather than deny, the writ.

2. Lewis's argument that there is nothing in the Eighth Circuit's "as applied" analysis that merits further review is based nearly entirely on an incorrect factual assertion. She precedes that assertion by correctly stating the law: that even in a nonpublic forum, viewpoint discrimination is prohibited. To draw this case into that realm, she then erroneously asserts that the Director of Revenue admitted that the decision to revoke the ARYAN-1 plate was viewpoint-motivated (Br. Opp. 7).

Even the court of appeals did not reach that conclusion. Instead, it assumed the sincerity of the Director's contention that the plate was rejected to prevent "road rage," and that the Department of Revenue "made no judgment about the viewpoint of [respondent's] speech" (Cert. Pet. App. A-22, 24). But had the court of appeals considered the entire record, it would have found that what it stated as an assumption was an uncontradicted fact. That record includes the Director of Revenue's deposition, where she explained: "The reason that the plate was denied was . . . based on public policy concerns in terms of

public safety . . . that [the plate] could in fact provoke road rage . . ." (Br. Opp. App. 1).[4]

With the factual error corrected, Lewis is left with the argument that considering reaction to speech is not permitted in determining how to regulate a nonpublic forum. As explained in the Petition, that position would depart from all precedent in the nonpublic forum area, and would thus merit this Court's attention.

The error in Lewis's assertion is irrelevant if she is saying, as she seems to imply, that when a public official is offended by a philosophy of racial genocide and acts in a manner consistent with that personal reaction, the action proves viewpoint discrimination *per se* (Br. Opp. 1). But

---

[4] Lewis cites the district court opinion for the proposition that the Department of Revenue notified respondent that the ARYAN-1 plate was rejected because it "conveyed a message that is contrary to public policy" (Br. Opp. 1). Lewis's quotation does not include the subquotes around the phrase "contrary to public policy," which is significant because that is the only part of the quoted material that was in the Department's revocation notice to respondent (Pet. App. A-7). The "conveyed a message" clause was not in the Department's letter; it was the district court's paraphrase. To the extent Lewis is implying that the Department acted because the plate "conveyed a message" as opposed to threatening public safety, the implication is erroneous. The Eighth Circuit did not repeat the "conveyed a message" paraphrase in its opinion.

there is no constitutional rule on which such an argument could be based. Officials' stated opposition to a viewpoint has never been enough to prove that the opposition caused all their actions adverse to that viewpoint. If that is what the Eighth Circuit held, its decision broadly threatens the free speech rights of public officials: if they do not remain mute, they are compelled to approve requests that they oppose, even when they have alternative, constitutionally acceptable bases for rejection.

Lewis does not reduce the apparent threat of the Eighth Circuit's rule by citing "heckler's veto" cases (Br. Opp. 7) and suggesting this case falls within the bounds of that narrow set. She does not and cannot claim that, until this case, the prohibition on a "heckler's veto" has ever been applied to a nonpublic forum prior.[5] Courts

---

[5] Following are the six cases cited by Lewis, including the pinpoint citation of the case where provided by Lewis, with a parenthetical explanation as to why the case has no bearing on a nonpublic forum "reaction to speech" analysis. In none of these cases does the majority use the phrase, "heckler's veto." *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134-135 (1992) (ordinance imposing variable permit fees for demonstrations in a public forum was facially overbroad; no as-applied or nonpublic forum analysis); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-56 (1988) (first amendment does not allow libel suits for damages for emotional distress; no as-applied or nonpublic forum analysis); *Murdock v. Pennsylvania*, 319 U.S. 105, 116 (1943) (reversing conviction of Jehovah's witnesses for

consistently allow restrictions on speech based on reactions to that speech in a nonpublic forum (Cert. Pet. 20-24).

Lewis also claims that this Court has already rejected the proposition that government can respond to the "secondary effects" of speech (such as reactions to speech). In support, she cites just one case: *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992) (hate crimes law facially invalid). But *R.A.V.* is neither an "as applied" nor a nonpublic forum case. It says nothing about whether the government can consider reactions to speech in a non-public forum.

3. In her Statement of Facts, Lewis suggests that Missouri's Director of Revenue did not, prior to or outside of this suit, assert that the ARYAN-1 plate was "inflammatory" (Br. Opp. 2). That suggestion presumably

---

residential soliciting without a license; conviction cannot stand based on mere unpopularity of message with "established" churches; no nonpublic forum analysis and no contention of dangerous reactions); *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 162 (1939) (convictions based on leafleting without a license reversed; no discussion of reaction to speech or nonpublic fora); *Gooding v. Wilson*, 405 U.S. 518 (1972) (criminal peace disturbance statute was facially overbroad because it covered non-fighting words; no as-applied or nonpublic forum analysis); *Terminiello v. Chicago*, 337 U.S. 1 (1949) (criminal conviction for breach of peace based on merely inviting dispute cannot be sustained; no nonpublic forum analysis).

bolsters her effort to ensure this case is decided only based on the statute's reference to "public policy," and to stay away from its bar on state production of "inflammatory" plates. But the suggestion is inaccurate and irrelevant.

In the administrative proceedings that preceded the district court filing, the Director expressly argued that the plate was inflammatory. Lewis, who obviously knew what occurred in the administrative proceedings, did not suggest to the court that there had been a change in position by the Director, nor that a change in position would be relevant. But the district court, working from a record that did not include the administrative transcript, *sua sponte* assumed there was a change. On appeal, the Director moved to supplement the record to include the portion of the transcript referring to the plate as "inflammatory." The court did not rule on the motion, neither before rendering its opinion nor after the failure to rule was noted in a petition for rehearing. See *Director of Revenue's Motion to Supplement the Record*, 8/21/00; *Appellee/Cross-Appellant's Petition for Rehearing and for Rehearing En Banc*, at 13-14, 7/3/01.

Moreover, the "public policy"/"inflammatory" distinction is irrelevant here. The ARYAN-1 plate is against public policy *because* it is inflammatory (Br. Opp. App. 1). Neither Lewis nor the lower courts have suggested that executive officials are barred from doing what courts routinely do: rule on just one dispositive ground rather than address all possible bases for a decision. In its initial demand letter the Department cited "public policy," which it deemed to be a dispositive ground, and did not separately reference the "inflammatory" nature of the requested plate.

That the Department chose to act in that fashion has no constitutional significance.

CONCLUSION

For the reasons stated herein and in the Petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General
JAMES R. LAYTON
State Solicitor

ERWIN O. SWITZER, III*
Special Chief Counsel
Wainwright State Office Building
111 North 7th Street, Suite 204
St. Louis, Missouri 63101
(314) 340-6816

Counsel for Petitioner,
Carol R. Fischer, Director of Revenue

* *Counsel of Record*

March 2002